

40-APP  
812-13524

Ex.

File No. 812-

UNITED STATES SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549

In the matter of:

1- Claymore Advisors, LLC; \*  
2- Claymore Active ETF Trust; and -01  
3- Claymore Securities, Inc. -02

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Section

APR 22 2008

Washington, DC

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Application for an Order under Section 6(c) of the Investment Company Act of 1940 for an exemption from Sections 2(a)(32), 5(a)(1) and 22(d) of the Act and Rule 22c-1 under the Act and under Sections 6(c) and 17(b) of the Act for an exemption from Sections 17(a)(1) and 17(a)(2) of the Act

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Claymore Advisors, LLC 2455 Corporate West Drive Lisle, IL 60532	Claymore Active ETF Trust 2455 Corporate West Drive Lisle, IL 60532	Claymore Securities, Inc. 2455 Corporate West Drive Lisle, IL 60532
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with a copy to:

Michael J. Rigert, Vice Chairman Claymore Advisors, LLC 2455 Corporate West Drive Lisle, IL 60532	Nicholas Dalmaso, Sole Trustee Claymore Active ETF Trust 2455 Corporate West Drive Lisle, IL 60532
Kevin M. Robinson, Esq. Claymore Advisors, LLC 2455 Corporate West Drive Lisle, IL 60532	Kathleen H. Moriarty, Esq. Katten Muchin Rosenman LLP 575 Madison Avenue New York, NY 10022

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As filed with the Securities and Exchange Commission on April 22, 2008.



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## I. INTRODUCTION

### A. Summary of Application

In this application dated as of April 10, 2008 ("Application"), the undersigned applicants: Claymore Securities, Inc. ("Claymore"), Claymore Advisors, LLC ("Claymore Advisors" or the "Adviser") and Claymore Active ETF Trust ("Claymore Trust" or "Trust"), (collectively, the "Applicants")<sup>1</sup> apply for and request an order under (i) Section 6(c) of the Investment Company Act of 1940, as amended ("Act") for an exemption from Sections 2(a)(32), 5(a)(1) and 22(d) of the Act and Rule 22c-1 under the Act and under Sections 6(c) and 17(b) of the Act for an exemption from Sections 17(a)(1) and (a)(2) of the Act ("Order").<sup>2</sup> Claymore Active ETF Trust will be organized as a statutory trust organized under the laws of Delaware. Claymore is a privately held financial services company organized as a Kansas corporation. Claymore Advisors is a limited liability company established under the laws of Delaware and is an affiliated person of Claymore.

The Order, if granted, would permit, among other things: (a) the open-end investment companies described herein and set forth in Exhibit B (individually referred to herein as a "Fund", and collectively as "Funds") to issue shares ("Shares") to be redeemable in large aggregations only; (b) secondary market transactions in Shares at negotiated prices, rather than at net asset value, on a national securities exchange as defined in Section 2(a)(26) of the Act, such as the American Stock Exchange LLC ("AMEX"), NYSE Arca, Inc. and NYSE Arca Marketplace, LLC (collectively, "NYSE Arca"), New York Stock Exchange LLC ("NYSE"), and The Nasdaq Stock Market, Inc. ("NASDAQ") (each, an "Exchange" and collectively, the "Exchanges"); and (c) certain affiliated persons of each Fund to deposit securities into, and

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<sup>1</sup> "Claymore" and "Claymore Advisors" are service marks of Claymore. All existing entities that intend to rely on the requested order have been named as Applicants. Any other existing or future entity that subsequently relies on the order will comply with the terms and conditions of the Application.

<sup>2</sup> For convenience, a glossary of defined terms is included as Exhibit A.

receive securities from, the Fund in connection with the purchase and redemption of aggregations of Shares of such Funds.

Applicants believe that (i) with respect to the relief requested pursuant to Section 6(c), the requested exemption for the proposed transactions is appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act, and (ii) with respect to the relief requested pursuant to Section 17(b), the proposed transactions are reasonable and fair and do not involve overreaching on the part of any person concerned; the proposed transactions are consistent with the policy of each Fund (as defined below); and that the proposed transactions are consistent with the general purposes of the Act.

All relief described in this sub-section I.A. will be collectively referred to in this Application as "Relief". The Relief requested in this Application relates to the initial Fund(s) identified in Exhibit B to this Application. The Trust will not offer additional funds ("Future Funds") unless: (1) Applicants have requested and received with respect to each such Future Fund either (i) exemptive relief from the U.S. Securities and Exchange Commission ("Commission") or (ii) a no-action letter from the Division of Investment Management of the Commission ("Staff") expressly relating to such Future Funds; or (2) the Future Funds will be listed on an Exchange without the need for a filing pursuant to Rule 19b-4 under the Securities Exchange Act of 1934, as amended ("Exchange Act"). Any Future Fund relying on any order granted pursuant to this Application will comply with the terms and conditions stated in this Application.

B. Comparability to Prior Commission Orders

Except as described herein, the requested Relief is substantially similar to that granted recently by the Commission to other open-end management investment companies commonly

referred to as “exchange-traded funds” or “ETFs” that are based upon an underlying financial index, including the relief granted to Claymore in connection with its family of index ETFs,<sup>3</sup> as well as to WisdomTree (“WT”), ProShares Trust, PowerShares, Rydex ETF Trust,<sup>4</sup> Nuveen Exchange-Traded Index Trust, Fidelity Commonwealth Trust, FRESCO Index Shares Funds, ETF Advisors Trust, Vanguard Index Funds (“Vanguard ETFs”), iShares Trust (“iShares”), Select Sector SPDR Trust (“Select Sector SPDRs”), iShares MSCI Series (formerly known as “WEBS”) (“WEBS”), and CountryBaskets Index Fund, Inc. (“CountryBaskets”).<sup>5</sup>

Also, the requested Relief is very similar to that granted by the Commission to certain unit investment trusts (“UITs”) that are based upon an underlying financial index: the BLDRS Index Funds Trust (“BLDRS”), Nasdaq-100 Trust, Series 1 (“QQQs”), Diamonds Trust

<sup>3</sup> In the Matter of Claymore Exchange-Traded Fund Trust, et al.; (“Claymore”) (File No. 812-13297) Investment Company Act Release No. 27483 (September 18, 2006) (“Claymore Index ETF Order”). Applicants note that they intend to rely upon the relief granted under Section 12(d)(1)(J) of the Act in the Claymore Index ETF Order for an exemption from Sections 12(d)(1)(A) and (B) of the Act to permit registered management investment companies and unit investment trusts to acquire shares of the Funds beyond the limits of Section 12(d)(1)(A) of the Act and each Fund and/or a broker-dealer (a “Broker”) registered under the Securities Exchange Act of 1934 (the “Exchange Act”) to sell shares to registered management investment companies and unit investment trusts beyond the limits of Section 12(d)(1)(B) of the Act (“12(d)(1) Relief”). Applicants represent that the Trust and its series described herein belong to the same “group of investment companies” (as defined in Section 12 (d)(1)(G)(ii)) as the Claymore Exchange-Traded Fund Trust series and therefore intend to rely upon the 12(d)(1) Relief granted in the Claymore Index ETF Order to the same extent and for the same purposes.

<sup>4</sup> In the Matter of Wisdom Tree Investments, Inc et al.; (“WisdomTree”) (File No. 812-13280) Investment Company Act Release No. 27391 (June 12, 2006) (“WisdomTree Order”); In the Matter of ProShares Trust et al., Investment Company Act Release No. 27394 (June 13, 2006) (“ProShares Order”); In the Matter of PowerShares Market-Traded Fund Trust, et al.; Investment Company Act Release No. 25985 (March 28, 2003) (“PowerShares Order”); and In the Matter of Rydex ETF Trust, et al.; Investment Company Act Release No. 25970 (March 31, 2003) (“Rydex ETF Order”).

<sup>5</sup> In the Matter of Nuveen Market-Traded Index Trust Investment Company Act Release No. 25451 (March 4, 2002) (“Nuveen Order”) The Trust was based on the America’s Fastest Growing Companies Index compiled and published by WTI (formerly, Individual Investor Group, Inc.). In the Matter of Fidelity Commonwealth Trust, et al., Investment Company Act Release No. 26178 (September 12, 2003), (“Fidelity Trust Order”); In the Matter of UBS Global Asset Management (US) Inc. and FRESCO Index Shares Funds, Investment Company Act Release No. 25767 (October 11, 2002) (“FRESCO Order”); In the Matter of ETF Advisors Trust, et al., Investment Company Act Release No. 25759 (September 27, 2002) (“ETF Advisors Order”); In the Matter of Vanguard Index Funds Investment Company Act Release No. 24789 (December 12, 2000) (“Vanguard ETFs Order”); In the Matter of Barclays Global Fund Advisors, Investment Company Act Release No. 24451 (May 12, 2000); In the Matter of Barclays Global Fund Advisors, Investment Company Act Release No. 24452 (May 12, 2000) (“iShares Orders”); In the Matter of the Select Sector SPDR Trust Investment Company Act Release No. 23534 (November 13, 1998) (“Select Sector SPDRs Order”); In the Matter of The Foreign Fund, Inc., et al., Investment Company Act Release No. 21803 (March 6, 1996) (“WEBS Order”); and In the Matter of CountryBaskets Index Fund, Inc., et al., Investment Company Act Release No. 21802 (March 5, 1996) (“CountryBaskets Order”).

("DIAMONDS"), MidCap SPDR Trust, Series 1 ("MidCap SPDRS"), the SPDR Trust, Series 1 ("SPDRS") and the SuperTrust Trust for Capital Market Fund, Inc. Shares.<sup>6</sup> These UITs, along with the ETFs mentioned in the previous paragraph, are collectively referred to herein as "Index ETFs".

Finally, the requested Relief is also substantially similar to that recently granted to certain actively managed ETFs<sup>7</sup> with fully disclosed portfolios ("Disclosed Actively Managed ETFs").<sup>8</sup>

### C. Overview of ETF Marketplace Development

Applicants observe that Index ETFs no longer are novel structures; for well over a decade, the Commission has had ample opportunity to review their operation to ensure that they would not lead to the abuses that the Act seeks to address. Presently, more than 600 of these products are actively traded on the AMEX and other Exchanges.<sup>9</sup> During the past decade, the

<sup>6</sup> In the Matter of BLDRS Index Funds Trust, et al, Investment Company Act Release No. 25797 (November 8, 2002) ("BLDRS Order"); In the Matter of the Nasdaq-100 Trust, et al, Investment Company Act Release No. 23702 (February 22, 1999) ("Nasdaq-100 Trust Order"); In the Matter of Diamonds Trust, et al, Investment Company Act Release No. 22979 (December 30, 1997) ("Diamonds Order"); In the Matter of MidCap SPDR Trust, Series 1, Investment Company Act Release No. 20844 (January 18, 1995) (""); In the Matter of SPDR Trust Series 1, Investment Company Act Release No. 19055 (October 26, 1992) ("SPDR Order"); and In the Matter of the SuperTrust Trust for Capital Market Fund, Inc. Shares, et al, Investment Company Act Release No. 17809 (October 19, 1990) ("SuperTrust Order").

<sup>7</sup> See, In the Matter of WisdomTree Trust, et al, Investment Company Act Release Nos. 28147 (Feb. 6, 2008) [73 FR 7776 (Feb. 11, 2008)] (notice) ("WisdomTree Actively Managed ETF Notice") and 28174 (Feb. 27, 2008) (order) ("WisdomTree Actively Managed ETF"); In the Matter of Barclays Global Fund Advisors, et al, Investment Company Act Release Nos. 28146 (Feb. 6, 2008) [73 FR 7771 (Feb. 11, 2008)] (notice) and 28173 (Feb. 27, 2008) (order) ("Barclays Actively Managed ETF"); In the Matter of Bear Sterns Asset Management, Inc., et al, Investment Company Act Release Nos. 28143 (Feb. 5, 2008) [73 FR 7768 (Feb. 11, 2008)] (notice) and 28172 (Feb. 27, 2008) (order) ("Bear Sterns Actively Managed ETF"); In the Matter of PowerShares Capital Management LLC, et al, Investment Company Act Release Nos. 28140 (Feb. 1, 2008) [73 FR 7328 (Feb. 7, 2008)] (notice) ("PowerShares Actively Managed ETF Notice") and 28171 (Feb. 27, 2008) (order) ("PowerShares Actively Managed ETF" and collectively, "Disclosed Actively Managed ETF Orders").

<sup>8</sup> A Disclosed Actively Managed ETF, in contrast to an Index ETF, does not attempt to track the performance of a specified index but rather has fully disclosed portfolio assets that are managed by its adviser to achieve its investment objectives.

<sup>9</sup> See, for example, the introduction to the Commission's Proposing Release Nos. 33-8901; IC-28193; File No. S7-07-08 ("Exchange-Traded Funds Rule"), Federal Register / Vol. 73, No. 53 / March 18, 2008 at 14619, footnotes 5 and 6.

degree of portfolio management used by Index ETFs has progressed from the passive, strict replication methods followed by the early UIT products such as the SPDR, DIAMONDS, and QQQs, to the sampled and/or optimized portfolio methods used by the management company products such as CountryBaskets, WEBS, iShares, Select Sector SPDRs and Vanguard ETFs to the leveraged and inverse funds of ProShares. Further, the underlying indices have evolved over time, with many of the recent products based on investment themes or quantitative strategies such as the Intellidex fundamentally weighted indices and Sabrient Insider Sentiment Index. Most recently, the Commission has granted relief to permit the advisers of certain Disclosed Actively Managed ETFs to manage their respective portfolios in a manner similar to that of traditional, non-index based mutual funds. In contrast to the adviser of an Index ETF, the adviser to a Disclosed Actively Managed ETF generally selects securities consistent with such ETF's investment objectives and policies without reference to a stated underlying index, in a manner similar to that of any traditional actively managed mutual fund's adviser.

Since the introduction of SPDRs, and especially after iShares funds began trading, the level of investor knowledge and understanding of ETFs has steadily risen. As of the date of this Application, retail and institutional investors may look to many sources for descriptions, explanations, comparisons, warnings, opinions and analyses of ETFs. For example, widely read publications such as USA Today,<sup>10</sup> the Chicago Tribune,<sup>11</sup> The New York Times<sup>12</sup> and Business Week,<sup>13</sup> as well as more specialized publications such as The Wall Street Journal,<sup>14</sup> Barrons,<sup>15</sup>

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<sup>10</sup> See, for example, "ETFs Less Scandalous Than Mutual Funds", John Waggoner, January 29, 2004, [http://www.usatoday.com/money/perfi/columnist/waggon/2004-01-29-etf\\_x.htm](http://www.usatoday.com/money/perfi/columnist/waggon/2004-01-29-etf_x.htm).

<sup>11</sup> See, for example, "Exchange -traded funds find favor", Andrew Leckey, September 25, 2005, [www.chicagotribune.com](http://www.chicagotribune.com).

<sup>12</sup> See, for example, "How Many Fund Choices Are Too Many?", J. Alex Tarquinio, New York Times, Business Section August 27, 2006, <http://www.nytimes.com/2006/08/27/business/yourmoney/27etfs.html?ex=1314331200&en=f9e19f24fb2c2a8c&ei=5088&partner=rssnyt&emc=rss>.

<sup>13</sup> See, for example, "ETFs: What the Buzz is About", Lauren Young, March 1, 2004, Business Week, [www.businessweek.com/magazine](http://www.businessweek.com/magazine) and "Quant Strategy ETFs, Not Just for Breakfast Anymore.", Aaron Pressman, August 8, 2006, Business Week/Online, [www.businessweek.com/investing](http://www.businessweek.com/investing).



and Investment News,<sup>16</sup> discuss various aspects of ETFs and follow the introduction of new products in this area. On-line sources also provide a wealth of information to the retail investor; see, for example, the Commission's own website which provides a succinct explanation of ETFs in its "OnLine Publications for Investors,"<sup>17</sup> as well as other websites that retail investors are likely to search for information such as those of the AMEX,<sup>18</sup> NYSE,<sup>19</sup> Wikipedia,<sup>20</sup> Yahoo Finance,<sup>21</sup> and MSNBC,<sup>22</sup> to name but a few examples. An investor wishing a deeper analysis of the ETF structure, or a particular ETF, can turn to various specialized and scholarly journals such as Journal of Indexes,<sup>23</sup> Institutional Investor,<sup>24</sup> Knowledge@Wharton,<sup>25</sup> Morningstar<sup>26</sup> and American Association of Individual Investors.<sup>27</sup> There are books<sup>28</sup> and websites<sup>29</sup> devoted solely to the topic of ETFs, and excellent primers and research papers prepared by

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<sup>14</sup> See, for example, "NYSE Addresses Risks of ETFs As Exposure to Investors Widens", Jane J. Kim, September 7, 2006, The Wall Street Journal, Page D2.

<sup>15</sup> See, for example, "ETF Trends", Tom Lydon, Barron's, February 25, 2006.

<sup>16</sup> See, for example, "Do ETF Competitors Hinder New Issues?", David Hoffman, June 19, 2006, <http://www.investmentnews.com>.

<sup>17</sup> See, <http://www.sec.gov/answers/etf.htm>

<sup>18</sup> See, [www.amex.com](http://www.amex.com)

<sup>19</sup> See, [www.nyse.com](http://www.nyse.com).

<sup>20</sup> See, [www.wikipedia.org](http://www.wikipedia.org).

<sup>21</sup> See, <http://finance.yahoo.com/etf>.

<sup>22</sup> See, [www.msnbc.com](http://www.msnbc.com).

<sup>23</sup> See, for example, "So You Want to Launch an ETF?", Kathleen Moriarty and Jeffrey McCarthy, Journal of Indexes, Volume 8 No. 4, July/August 2006 at [www.indexuniverse.com/JOI](http://www.indexuniverse.com/JOI).

<sup>24</sup> See, for example, "More Diverse Pool Of ETF Investors Expected To Emerge", dailyii, Institutional Investor.com January 7, 2004, at <http://www.dailyii.com/article.asp?ArticleID=1032011>.

<sup>25</sup> See, for example, "Exchange Traded Funds: What's the (Big) Deal?"; October 5, 2005 in Knowledge@Wharton.com.

<sup>26</sup> See, for example, "Morningstar Introduces Rating for U.S. Exchange-Traded Funds", Kathy Panagopoulos, March 3, 2006, Morningstar, <http://corporate.morningstar.com/us/asp/subject.aspx?xmlfile=174.xml&filter=PR4161>.

<sup>27</sup> See, for example, The Individual Investor's Guide to Exchange-Traded Funds 2005; Maria Crawford Scott; October 2005.

<sup>28</sup> See, for example, The Exchange-Traded Fund Manual, Gary Gastineau, Wiley Finance, 2002 and Exchange Traded Funds: An Insider's Guide to Buying the Market, IndexFunds.com, Wiley, 2001.

<sup>29</sup> See, for example, [www.exchangetradedfunds.com](http://www.exchangetradedfunds.com); [www.etftrends.com](http://www.etftrends.com); and [www.etf.guide.com](http://www.etf.guide.com).

investment advisers,<sup>30</sup> broker-dealers,<sup>31</sup> and others in the financial products area, as well as the ETF sponsors.

Applicants observe that, the increase in the number of Index ETFs being offered and traded during the past five (5) years has been driven, in part, by the strong demand of financial advisors (“FAs”) and others in the financial services industry for a wide array of these products. FAs have been early adopters of Index ETFs for several reasons, most notably because they have been able to use Index ETFs in clients portfolios to provide flexibility, efficiency, cost reduction and other means of providing value to clients.<sup>32</sup> Many established FAs are re-orienting their business models to accommodate an increased use of Index ETFs, and new FAs often commence their business by using Index ETFs as “core” portfolio investments. The FA community, as well as other market participants, have embraced the continued progress of Index ETFs from strictly passive indexing to enhanced indexing strategies, to strategy-based and theme-based indexing strategies, and are eager to use actively managed or “active” ETFs as another tool to enhance performance in their clients’ portfolios.<sup>33</sup>

By November 2001, there was enough interest in active ETFs exhibited by various types of market participants that the Commission issued its concept release on the topic<sup>34</sup> to explore various legal and structural issues surrounding these products; by March 2008, the Commission

<sup>30</sup> See, for example, “Exchange-Traded Funds, Revisited”, August 2006 at [www.pmfa.com](http://www.pmfa.com).

<sup>31</sup> See, for example, Schwab’s “Research Exchange Traded Funds”: at [http://www.schwab.com/public/schwab/research\\_strategies/etf/index.html?src=mx&...](http://www.schwab.com/public/schwab/research_strategies/etf/index.html?src=mx&...); Nuveen’s ETF Connect “Education Center” at [http://www.etfconnect.com/education/fundamentals\\_etf.asp](http://www.etfconnect.com/education/fundamentals_etf.asp), and iShares “Document Library” <http://www.ishares.com/library/search.jhtml;jsessionid=2COYG1X11HSJIRJUMTCBBG SFGQOEOD50>.

<sup>32</sup> See, for example, “The ETF Advisors”, Jane Wollman Rusoff, ResearchMag.com, October 10, 2006 at [http://www.researchmag.com/cms/research/monthly%20issues/Issues/2006/10/Index/Features/10\\_cover](http://www.researchmag.com/cms/research/monthly%20issues/Issues/2006/10/Index/Features/10_cover), as well as Weiss Capital Management’s “WCM Sector Series ETF Sector Rotation” at <http://www.weisscapitalmanagement.net/ETF-concentrated.html>.

<sup>33</sup> See, for example, “Actively Managed ETFs: Coming Soon to an Exchange Near You?” Lee Barney, The Street.com, May 24, 2001 at <http://www.thestreet.com/funds/funds/1440520.html>; See also the entry for “exchange-traded fund- Actively managed ETF”, Answers.com at <http://www.answers.com/topic/exchange-traded-fund-2>.

<sup>34</sup> Rel. No. IC-25258; File No. S-7-20-010 (“Concept Release”).

proposed its Exchange-Traded Funds Rule in part due to concerns that the direct and indirect costs associated with the exemptive application process might be preventing ETF innovation and competition.<sup>35</sup> Applicants observe that the Exchange-Traded Funds Rule proposal explicitly mentions that the Commission will continue to entertain “applications for exemptive orders for actively managed ETFs that do not satisfy the proposed rule’s transparency requirements” (for the purposes of this Application, defined as “Active ETFs”).<sup>36</sup> Therefore, Applicants have looked to the Concept Release for guidance as to how the Commission might “evaluate any proposals for these types of products [Active ETFs] as they are presented to [the Commission] through the exemptive process on a case by case basis.”<sup>37</sup> For the avoidance of confusion, the Funds which are the subject of this Application will be considered Active ETFs in contrast to “Disclosed Actively Managed ETFs”, because the Funds do not intend to disclose their portfolios on a basis more frequent than their active mutual fund counterparts and hence would not satisfy the proposed Exchange-Traded Funds Rule transparency requirements.

D. Overview of the Concept Release

The Commission raised four broad questions in the Concept Release:

1. How will investors use, and benefit from, Active ETFs?
2. How are Active ETFs likely to be structured, managed and operated?
3. Would the exemptive relief that the Commission has granted to index-based ETFs be appropriate for Active ETFs?
4. Are there any new regulatory concerns that might arise in connection with Active ETFs?<sup>38</sup>

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<sup>35</sup> See, Exchange-Traded Funds Rule, Federal Register / Vol. 73, No. 53 / March 18, 2008 at 14646.

<sup>36</sup> See, Exchange-Traded Funds Rule, Federal Register / Vol. 73, No. 53 / March 18, 2008 at 14623.

<sup>37</sup> See, Concept Release at 4.

<sup>38</sup> Concept Release at 9.

Answers to these questions will be discussed throughout this Application in greater detail, but a basic overview of this discussion is presented here for ease of reference. Applicants intend to show, with respect to the structure of the Trust and its Funds as described herein, that:

1. Investors in the Funds will benefit from the customary features of Index ETFs, including the convenience and flexibility of intra-day pricing and trading, lower costs and expenses, and possible tax efficiencies made possible by the structure of each Fund as an Active ETF;
2. The Funds, as Active ETFs, will be structured and operated in a manner very similar to that of Index ETFs, except that the "AMEX Proprietary Methodology" (defined and described below) will be used to facilitate meaningful arbitrage transactions because each Fund's securities portfolio will not be transparent to the market;
3. The exemptive relief granted to Index ETFs is equally appropriate for the Active ETFs; and
4. Although the Funds, as Active ETFs, will be structured, operated and managed in some ways differently than Index ETFs, Applicants believe that there are no new regulatory concerns raised by such differences.

E. Index ETF Arbitrage Mechanism and Portfolio Transparency

Many Index ETF users, market participants, commentators and academics,<sup>39</sup> as well as the Commission,<sup>40</sup> have noted that the transparent, open-ended creation/redemption structure of

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<sup>39</sup> See, for example, "Intra-day Price Discovery in the DJIA Index Markets", Yiuman Tse, Paramita Bandyopadhyay and Yang-Pin Shen at <http://www.fma.org/SLC/Papers/DJIAIndexMarkets.pdf#search=%22ETF%20%20%22ar%20bitrage%22%22>.

<sup>40</sup> See, for example, the recent "Remarks before the 4th Annual Art of Indexing Summit", Andrew J. Donohue, Director, Division of Investment Management, U.S. Securities and Exchange Commission, September 20, 2006 at [www.sec.gov/news/speech/2006/spch092006ajd.htm](http://www.sec.gov/news/speech/2006/spch092006ajd.htm) ("Donohue Remarks").

Index ETFs facilitates arbitrage activity, thereby keeping negotiated prices of their shares on secondary markets substantially in line with the intra-day value of the assets in their underlying portfolio. By way of illustration, if the price of an Index ETF's shares is significantly less than the estimated intra-day value of its underlying portfolio securities, then arbitrageurs can (i) purchase enough of such Index ETF shares to assemble a Creation Unit, (ii) redeem the Creation Unit with the Index ETF in exchange for a redemption basket, and (iii) simultaneously sell the securities comprising the redemption basket, thus realizing a profit. This additional demand for Index ETF shares tends to increase their market price as compared to their intra-day value, thus narrowing the discount. In contrast, if the price of an Index ETF's shares is significantly greater than the intra-day value of its underlying portfolio securities, then arbitrageurs can (i) purchase the requisite amount of such underlying portfolio securities to assemble a portfolio deposit, (ii) purchase a creation unit from such Index ETF, and (iii) simultaneously sell the Index ETF shares on the secondary market at a profit. The additional supply of Index ETF shares tends to decrease their market price relative to their intra-day value, thus narrowing the premium. The substantial equivalence of an Index ETF share prices in creation/redemption transactions with its fund and the ETF share prices on the secondary markets resulting from arbitrage mitigates the risk that larger institutional investors are favored over smaller individual investors.

The Commission and others in the financial community have been aware of the role that portfolio transparency ("Transparency") has played in an Index ETF's ability to permit "the arbitrage discipline to function so as to keep the market price of shares close to the [Index ETF's] net asset value."<sup>41</sup> Applicants agree that Transparency has enabled market makers for Index ETFs to quickly and efficiently effect arbitrage transactions that have resulted in negotiated prices for individual Index ETFs trading on the secondary market that are close to the

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<sup>41</sup> Concept Release at 10, as well as the Donohue Remarks cited in footnote 40.

intra-day value of their underlying portfolio assets.<sup>42</sup> Also, Applicants understand that arbitrageurs have found it easy to hedge their positions in shares of Index ETFs because their Transparency permits all of their relevant portfolio characteristics to be known, including (i) the identity of each of the security issuers, (ii) the credit rating and maturity date of each debt security, and (iii) the intra-day value of such Index ETFs' creation/redemption portfolio, which serves as a proxy for such fund's actual holdings.

Nevertheless, Applicants assert that Transparency is not the sole means by which market makers might reliably provide secondary market liquidity for Active ETFs; they have evaluated several alternative product structures that might accomplish the same purpose. In assessing these various alternatives, Applicants made several assumptions about design features that they believe retail and institutional investors, market participants, portfolio managers and the Commission alike would deem crucial for a successful alternative arbitrage mechanism for Active ETFs. Briefly stated, these assumptions are that:

1. Investors and the Commission will insist on an orderly secondary market with consistent and reasonable spreads between bid and offer prices for Active ETF shares during the trading day;
2. Active ETF managers will want to offer to investors the familiar advantages of the Index ETF structure while simultaneously keeping their portfolio holdings and transactions as confidential as they do now for their traditional open-end management companies; and
3. Arbitrageurs will insist on a reliable mechanism that will permit them to both (i) hedge efficiently and (ii) reliably estimate when the secondary market price for a

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<sup>42</sup> The Commission has also recognized the same effect in connection with the Disclosed Actively Managed Funds. *See*, Disclosed Actively Managed ETF Orders and *see also*, Exchange Traded Fund Rule at Federal Register / Vol. 73, No. 53 / Tuesday, March 18, 2008 at 14623.

share of an Active ETF begins to diverge meaningfully from its true intra-day value.

Applicants have selected the AMEX Proprietary Methodology described briefly below and in more detail in this Application to provide an alternative arbitrage mechanism that will meet all the criteria described in items 1-3 above. Applicants intend to show that each Fund, designed to use the AMEX Proprietary Methodology, should function similarly as an Index ETF structured to use Transparency, in providing reasonably tight spreads and a reasonably reliable hedging mechanism during each trading day.

F. Overview of the AMEX Proprietary Methodology

Several issues were considered in designing a system of intra-day market trading for which an arbitrage mechanism is not based upon Transparency. By itself, an Active ETF that is not Transparent provides limited information on which to base negotiated trading prices. Investors do not know either (i) the specific assets comprising such Active ETF's portfolio or (ii) the estimated intra-day net asset value ("NAV") of such fund throughout the trading day. This limited information is insufficient for many market participants and liquidity providers, especially market specialists and market makers (collectively, "Liquidity Providers"), who match buy orders with sell orders or commit their own capital to buy and sell ETFs themselves in order to keep markets orderly and liquid, to hedge their trading risks and make reasonably tight markets. When Liquidity Providers receive more orders to sell shares of any specific ETF than to buy, they may buy the ETF shares themselves and wait for more buy orders for shares of that ETF. During the time they are waiting, the Liquidity Providers risk the possibility that the value of the ETF shares they hold will fall. The Liquidity Providers may hedge against this risk by executing one or more securities and/or derivatives trades that they believe will offset such risk. If the orders were to involve shares of an Active ETF, however, the Liquidity Providers would

have no information about its current portfolio holdings, and thus would lack sufficient knowledge to be able to effectively hedge this risk. Without this ability to effectively hedge, the Liquidity Providers would be expected to price this additional risk into their markets, resulting in a wide spread between bid and offer prices of the Active ETF shares, which in turn would inhibit trading.

Applicants believe that the AMEX has created a workable solution for these problems by developing and patenting a process that employs a statistical risk factor methodology<sup>43</sup> to create a surrogate "Tracking Portfolio" that looks very different from the actual portfolio holdings of an Active ETF, in terms of issuers and weights, but which behaves very much like the actual fund holdings on an intra-day basis. A Tracking Portfolio is constructed for the purpose of providing a close proxy for the actual portfolio of securities held by each Active ETF, including the Funds.

This "Tracking Portfolio" can be used to (i) estimate the NAV of an Active ETF throughout the trading day by publishing an intra-day indicative value ("IIV") and (ii) to enable market makers to determine hedging portfolios by performing risk analysis on the Tracking Portfolio as if it were the Active ETF's actual portfolio holdings. In brief, the AMEX will run an assessment using an existing mutual fund's prior portfolio holdings and trading transactions over a given period ("Testing Assessment").<sup>44</sup> This Testing Assessment done by the AMEX will involve using the statistical risk factor methodology to determine specific and detailed risk models for each day of the entire period utilizing a universe of stocks chosen by the fund's manager to have similar characteristics to the fund's portfolio holdings and investment objectives ("Stock Universe"). So, for example, a Stock Universe of large cap stocks likely would be

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<sup>43</sup> See, subheading "Description of AMEX Proprietary Methodology" in Section VI .C.2 below which briefly discusses the "Principal Components Analysis" methodology used. See also, the term briefly explained at [http://en.wikipedia.org/wiki/Principal\\_components\\_analysis](http://en.wikipedia.org/wiki/Principal_components_analysis), as well as a more expanded discussion in "A Tutorial on Principal Components Analysis", Lindsay I Smith, February 26, 2002 at [http://csnet.otago.ac.nz/cosc453/student\\_tutorials/principal\\_components.pdf#search=%22%20%22Principal%20Components%20Analysis%22%22](http://csnet.otago.ac.nz/cosc453/student_tutorials/principal_components.pdf#search=%22%20%22Principal%20Components%20Analysis%22%22).

<sup>44</sup> Typically, the AMEX has performed the Testing Assessment over a 6 month basis.



selected by a manager of a large-cap mutual fund. These risk models and the corresponding prior portfolio holdings are used to determine detailed risk characteristics of the portfolio which are then used to create the Tracking Portfolio for each given day in the period. The Testing Assessment will examine the accuracy of tracking between the actual holdings of the fund and the Tracking Portfolio on an intra-day basis. This examination using the same processes that will be in place during actual trading is typically done at 5 minute intervals for the following trading day. As actual trading commences, Applicants intend that the contents of the Tracking Portfolio will be disclosed in the same manner and to the same extent as are the portfolio holdings of Index ETFs, as briefly described in Sections V.A.8 and V.A.9. Various arbitrageurs and market makers have advised the AMEX and Applicants that they believe the Tracking Portfolio will enable them to hedge their positions and to execute arbitrage transactions when the trading price of Active ETF shares deviates meaningfully from the IIV, which is determined as the per share value at any point in time during the trading day of the Tracking Portfolio.

## II. OVERVIEW OF PRODUCT STRUCTURE

### A. Summary

Applicants have undertaken the development of the Funds as Active ETFs; they are structured as actively managed open-end investment companies intended to offer both retail and institutional investors a lower cost and more flexible investment alternative to traditional mutual funds. In light of investor and market participants' familiarity with the Index ETF structure, and given the acceptance of the product over the past decade, Applicants have made every effort to design the structure of the Funds as Active ETFs in a manner substantially similar to the Index ETF structure, with the exception of certain aspects that specifically relate to active portfolio management, such as the lack of Transparency of each Fund's portfolio. Therefore, customary

Index ETF features, including (i) the creation/redemption of specified large aggregations of Shares (each such aggregation a "Creation Unit") at NAV calculated as of 4 p.m. Eastern Time ("E.T."), (ii) secondary market trading activity end time of 4:00 or 4:15 p.m. E.T (depending upon the relevant Exchange's rules), and (iii) 15 second calculation of IIV during the trading day, will be present in the Funds' design, as discussed further herein. Unless otherwise expressly described in this Application, Applicants expect that the Trust, the Funds, and their Shares should operate and trade in a manner substantially similar to that of their Index ETF counterparts.

Applicants will cause the Claymore Active ETF Trust to file a Registration Statement on Form N-1A and Notification of Registration on Form N-8A with the Commission as an open-end management investment company authorized to offer an unlimited number of Funds, which are separate investment portfolios of equity securities. Each Fund will have a distinct investment objective which will be different than that of the other Funds. Each Fund will be advised by the Adviser and may also be subadvised by a separate investment adviser, within the meaning of Section 2(a)(20)(B) of the Act, that is not otherwise an affiliated person of the Adviser or the Funds ("Sub-Adviser"). The Adviser will develop the overall investment program for each Fund and oversee the Sub-Adviser's activities. Although authorized to do so, the Funds presently do not intend to impose or pay Rule 12b-1 distribution fees.

The Relief requested in this Application relates to the Funds identified in Appendix B hereto. Each Fund will issue, on a continuous offering basis, its Shares, to be listed and traded on an Exchange. The Trust will issue Shares with respect to each Fund on a continuous offering basis and only in "Creation Units" for such Fund, as will be stated in its statutory prospectus ("Prospectus") filed with the Commission under the Securities Act of 1933, as amended ("Securities Act"). The size of such Creation Unit will be determined by the Adviser in the

manner described in Section II B. below. Applicants expect that the price of a Creation Unit will be a minimum of \$500,000<sup>45</sup> and that the initial trading price per Share of each Fund will fall in the range of \$10 to \$60. Like the shares of all Index ETFs currently listed and trading on an Exchange, individual Shares of each Fund will be listed and traded on an Exchange but will not be individually redeemable; only Shares assembled into Creation Units will be redeemable. Creation Units will not be listed or traded on an Exchange. Applicants intend to establish the initial NAV per Share at a level convenient for trading purposes.<sup>46</sup>

Applicants believe that each Fund, as an Active ETF, must be available on an “open-end” basis (*i. e.*, continuously offered) and provide ready redeemability for investors presenting one or more Creation Units for redemption, in the manner similar to that of Index ETFs. Unlike the creation/redemption mechanism for an Index ETF, however, which accepts and tenders a basket of specified securities held in its portfolio (“Portfolio Securities”) in exchange for its shares, purchases and redemptions of Creation Units of each Fund generally will be made primarily by a tender of shares of one or more specified Index ETFs, such as SPDRs, with any cash portion of the purchase price and redemption proceeds to be kept to a minimum, all in the manner described below in Section V.A.9 “Payment for Creation Units” and in Section V.A.10 “Redemption of Creation Units.” Applicants believe that this creation/redemption mechanism, which receives and delivers Index ETF shares rather than actual individual Fund Portfolio Securities, is necessary for the operation of each Fund because it preserves the confidentiality of such Fund’s portfolio. It also reduces underperformance of each Fund

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<sup>45</sup> The size of a Creation Unit as stated in a Fund’s Prospectus may be changed, from time to time, by the Advisor, if the individual Share price of such Fund increases to such an extent that the Creation Unit price becomes unappealing to investors seeking to create or redeem and arbitrageurs. In no case will the initial price of a Creation Unit be less than \$200,000.

<sup>46</sup> Applicants believe that a convenient trading range will be between \$10 and \$60 per Share. Therefore, each Fund will reserve the right to declare a stock split, or a reverse stock split, if the trading price over time deviates significantly from such price range. As discussed below in Section V.A.2, each investor in a Fund will have one vote per Share.

associated with holding cash from creation activity until it can be invested (“cash drag”), since the ETFs held by a Fund on creation of new Shares provides market exposure similar to such Fund’s investment objective. To the extent a Fund would otherwise equitize this cash through futures or ETFs, this mechanism also minimizes such Fund’s need to buy or sell ETFs or futures in connection with creation or redemption of Creation Units. Thus, Applicants expect that this method will reduce each Fund’s transaction costs associated with cash equitization in a manner similar to the “in-kind” mechanism currently used by existing Index ETFs. Applicants note, however, that to the extent the Adviser decides to convert equitized cash to specific Fund holdings, or vice versa, such Fund will incur transaction costs associated with those transactions. Thus, transaction costs in Active ETFs can be expected to be higher than Index ETFs. Applicants observe that creations and redemptions using specified Index ETF shares also will provide a number of benefits to investors such as flexibility, efficiencies in pricing and hedging, and reductions in certain costs, such as creation/redemption fees and various other fund overhead costs and fund accounting costs.

**B. Brief Description of Trust and its Funds**

Each Fund will issue, on a continuous offering basis, its Shares to be listed and traded on an Exchange. The Trust will issue, with respect to each Fund on a continuous offering basis, only Creation Units in a specified amount currently expected to be within a range of 10,000 up to 60,000 Shares, as will be clearly stated in each Fund’s Prospectus. The size of such Creation Unit for each Fund will initially be determined by the Adviser, based in part on the estimated initial trading price per Share of such Fund and the size of Creation Units for Index ETFs trading at that time, as well as the Fund’s intended audience. As noted above, Applicants expect that the initial price of a Creation Unit will be a minimum of \$500,000 and will fall in the range of \$200,000 to \$5 million, and that the initial trading price per Share of each Fund will fall in the

range of \$10 to \$60. Like the shares of all Index ETFs currently listed and trading on an Exchange, individual Shares of each Fund will be listed and traded on an Exchange but they will not be individually redeemable; only Shares assembled into Creation Units will be redeemable. Creation Units will not be listed or traded on an Exchange.

Applicants submit that the structure and operation of the Trust and its Funds should be extremely familiar to investors and market participants who currently use Index ETFs and that each Fund's creation/redemption mechanism will function in a manner very similar to that currently in effect for existing Index ETFs. Applicants intend to make clear in this Application that the Trust and its Funds will be structured and operated almost identically to the Index ETFs and Disclosed Actively Managed ETFs now trading on the Exchanges. Therefore, Applicants believe that no additional relief, disclosure or rule modifications should be required to provide investor protection or prevent investor confusion. As will be discussed herein, Applicants assert that the Trust and its Funds raise no new issues or concerns and therefore are appropriate vehicles for the Relief sought in the Application.

### III. CONCEPT RELEASE

#### A. Summary

##### 1. Background

The Commission has stated that it considers Transparency and liquidity of portfolio securities to be significant factors in the effectiveness of the ETF arbitrage mechanism.<sup>47</sup> In the Concept Release, the Commission questioned whether the same level of Transparency and frequency of disclosures about portfolio holdings utilized by current Index ETFs would pose

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<sup>47</sup> Concept Release at 10 and Exchange-Traded Funds Rule, Federal Register/Vol. 73, No. 53/March 18, 2008 at 14620 and footnote 27.

problems such as “front running” and “free riding” if used by Active ETFs such as the Funds.<sup>48</sup> Similar issues were raised by the Commission with respect to possible conflicts of interest between maximizing the performance of an adviser’s investment strategy and providing the most efficient pricing through a strong arbitrage mechanism by informing the marketplace of its portfolio strategy.<sup>49</sup>

## 2. Structure and Operation of the Trust and its Funds Compared to Current ETFs

Applicants believe that the structure and operation of the Trust and its Funds will be substantially similar to that of the Index ETFs and the Disclosed Actively Managed ETFs mentioned in this Application (collectively, “Current ETFs”). As discussed below, the liquidity of the Deposit/Redemption Securities, the arbitrage opportunities resulting from the AMEX Proprietary Methodology, and the level and detail of information contained in the Prospectus, Product Description and website for the Funds will be extremely familiar to investors in Current ETFs. Consequently, Applicants have every expectation that the Funds will operate substantially similarly to the domestic Current ETFs trading now in the secondary market.

## 3. Possible Structural and Operational Differences

The Commission posited that more frequent, and less predictable, portfolio changes would occur in connection with Active ETFs than is the case for Current ETFs. This, coupled with the likelihood that an Active ETF would not publish an intra-day or daily portfolio, led the Commission to question whether the creation/redemption process, and hence the arbitrage mechanism, would be less efficient.<sup>50</sup> In addition, the Commission inquired as to

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<sup>48</sup> Concept Release at 11.

<sup>49</sup> Concept Release at 11

<sup>50</sup> Concept Release at 9.

whether the frequent portfolio changes likely to be experienced by Active ETFs would result in higher expenses and decreased tax efficiency.<sup>51</sup>

#### 4. Portfolio Transparency, “Front Running” and “Free Riding”

As discussed throughout this Application and summarized briefly in subsection (d) below, Applicants believe that the alternate arbitrage mechanism provided by the AMEX Proprietary Method, as well as the structure of the Trust, will permit the Trust to maintain a policy of portfolio confidentiality (“Confidentiality”) with respect to its Funds that is typical for actively managed open-end investment companies. That being the case, Applicants believe that no investor should have any informational advantage over any other investor or market participant, hence concerns about “front running” and “free riding” should be minimized.

#### 5. Liquidity of Portfolio Securities

Applicants expect that all portfolio securities held by the Funds primarily will be liquid and traded on a domestic Exchange because each Fund is a large-cap domestic equity fund. In addition, it is likely that most, if not all, creation and redemption activities will be transacted through the in-kind exchange of Fund Shares for shares of one or more specified large-cap Index ETFs,<sup>52</sup> which may be accompanied by large-cap stocks, some of which may be among the Fund’s underlying portfolio securities from time to time. Given that large-cap Index ETFs and large-cap stocks are highly liquid, Applicants expect that buyers of Deposit Securities, sellers of Redemption Securities and arbitrageurs will have a ready ability to transact in each Fund’s Deposit Securities as well as its Redemption Securities. Further, the Adviser will decide on the ultimate investments for the Funds, and in so doing, will consider

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<sup>51</sup> Concept Release at 9.

<sup>52</sup> See the discussion in Sections V.A. 8, 9 and 10 below, as well as footnote 59, *infra*.

such factors as liquidity in making those investments. While making these determinations, the assets of each Fund will remain equitized through Index ETFs.

#### 6. Arbitrage Mechanism

Applicants believe that the arbitrage opportunities offered by the Trust and its Funds should be similar to those offered by existing Current ETFs, although perhaps somewhat riskier than most Index ETFs, and therefore, that the secondary market prices of each Fund's Shares should reasonably track its NAV or otherwise correspond to the fair value of its underlying portfolio, although likely not as closely as most Current ETFs. As noted above, the Commission has granted exemptive relief to existing Current ETFs in large part because their structures enable efficient arbitrage, thereby minimizing the premium or discount relative to such ETFs' NAV. Applicants acknowledge and understand that Transparency is considered to be the key element in effective arbitrage and a fundamental characteristic of Current ETFs.<sup>53</sup> Applicants therefore have selected the method described below as the "AMEX Proprietary Methodology" as an alternative to Transparency, in order to facilitate arbitrage and keep the policy of Confidentiality with respect to each Fund's portfolio securities.<sup>54</sup>

#### 7. Other Operational Issues

The Concept Release also raised concerns about whether an active ETF, such as the Funds, would operate differently from an Index ETF, citing as examples the possibility of different clearance and settlement procedures. Applicants have been advised that each Fund will be able to use the identical clearing and settlement procedures now used by domestic Current ETFs and therefore they expect that each Fund should experience many of the operational and cost efficiencies now enjoyed by the Current ETFs. Given the structure and operation of the

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<sup>53</sup> See footnote 49, *supra*, as well as Donohue Remarks.

<sup>54</sup> Of course, each Fund will comply with all applicable regulatory requirements regarding periodic disclosures of its portfolio securities.



Trust and its Funds as Active ETFs, and the use of the AMEX Proprietary Methodology, the Tracking Portfolio, and Confidentiality as described herein, Applicants believe that no new or additional operational issues are raised in this Application.

#### 8. Possible New Regulatory Issues

The Commission also raised the concern that the operation of an active ETF, such as the Funds, might place retail investors purchasing shares in the secondary market at a financial disadvantage to creators, redeemers and arbitrageurs.<sup>55</sup> In addition, the Commission queried whether the operation of an active ETF might lend itself to possible conflicts of interest for the Adviser, who would have the ability to designate portfolio securities and might have an incentive to create a market for such securities “in a way that would favor an affiliate”.<sup>56</sup> The Concept Release also asked whether the “increased value of the information regarding the identity of future deposit or redemption securities [would] create additional conflicts and potential for abuse”.<sup>57</sup>

Applicants have made every effort to structure the Trust and its Funds in a manner that would not favor creators, redeemers and arbitrageurs over retail investors buying and selling in the secondary market. No investor, no matter how large, will know how or when changes in each Fund’s actual portfolio are determined, nor when they will occur. Further, because the Trust and the Funds intend to preserve Confidentiality, all investors will have same-time access to the limited portfolio information provided by the Funds in compliance with the Act; similarly all investors, whether retail or institutional, will learn of changes to the Funds’ benchmarks at the same time. Also, given that each Fund will accept and deliver mainly shares of liquid Index

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<sup>55</sup> Concept Release at 21.

<sup>56</sup> Concept Release at 22.

<sup>57</sup> Concept Release at 22.

ETFs<sup>58</sup> (and large-cap securities, from time to time) as Creation and Redemption Securities, neither the Adviser nor Sub-Adviser should be able to favor an affiliate by specifying certain Deposit or Redemption Securities over others. Applicants observe that receiving or delivering highly liquid Index ETF shares has the economic equivalent of providing benchmark exposure to each Fund's portfolio, with the anonymity of receiving or delivering cash; indeed portfolio managers using Index ETF Shares in this manner often refer to them as "equitized cash".

#### IV. THE APPLICANTS; OTHER PARTIES

##### A. The Trust and its Funds

Claymore Active ETF Trust is a business trust organized under the laws of Delaware. The Trust intends to create separate Funds, the first two of which are described in Exhibit B as the Initial Funds, which will operate pursuant to the terms and conditions stated in this Application. Each Fund intends to qualify as a regulated investment company ("RIC") under the Internal Revenue Code ("Code").

##### B. Claymore, Claymore Advisors and the Adviser

Claymore is a Kansas corporation and a privately held financial services company. Claymore and its affiliated persons provide supervision, management, servicing or distribution services to various closed-end funds, exchange-traded funds and unit investment trusts. Claymore's principal offices are located at 2455 Corporate West Drive, Lisle, Illinois 60532.

Claymore Advisors will be the investment adviser to each of the Initial Funds (in such capacity, the "Adviser"). Claymore Advisors is a Delaware limited liability company, with its principal office located at 2455 Corporate West Drive, Lisle, Illinois 60532. Each of Claymore and Claymore Advisors is a wholly-owned subsidiary of Claymore Group Inc. and as such is an

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<sup>58</sup> See footnote 59, *infra*.

affiliated person of the other within the meaning of Section 2(a)(3)(C) of the Act. Each of Claymore and Claymore Advisors is registered as an “investment adviser” under Section 203 of the Advisers Act. The Adviser has not yet entered, but intends to enter, into Sub-Advisory agreements with one or more additional investment advisers to act as “sub-advisers” with respect to the Initial Funds, as well as other Funds in the future (collectively referred to as the “Sub-Adviser”).

C. The Sub-Adviser and Other Service Providers

Each Sub-Adviser to a Fund will either be registered under the Advisers Act or be exempt from such registration and will function as the portfolio manager for each such Fund. The Adviser will enter into a written agreement with each Sub-Adviser (“Sub-Advisory Agreement”); in the case of the Initial Funds, each Sub-Adviser will be a portfolio manager who currently manages a portfolio of domestic, large cap equity securities selected in light of the investment objective of each such Fund. The investment objective of each Initial Fund is disclosed on Schedule B hereto, as is the Sub-Adviser for one of the Initial Funds.

The Trust may hire different Sub-Advisers from time to time. No Sub-Adviser will be otherwise an affiliated person of any Fund. The Adviser, subject to the oversight and authority of the Board, will furnish the overall investment program for each Fund, oversee the implementation of this program, arrange and oversee the provision of other necessary services for the Funds (including custodial, transfer agency and administration services) and furnish office facilities, equipment, services and executive and administrative personnel necessary for managing the investment program of each Fund.

Applicants note that the Sub-Adviser’s affiliates may be hired to provide other services, such as custodian or transfer agency services, to the Funds, subject to the approval of the Funds’ Board. The Sub-Adviser, subject to the oversight and authority of the Adviser and the Funds’

Board, will implement each Fund's investment program and oversee the day-to-day portfolio activities of each Fund.

D. The Distributor

Claymore, a broker-dealer registered under the Exchange Act, will act as distributor and underwriter of the Creation Unit Aggregations of Fund Shares (in such capacity, the "Distributor"). The Distributor will distribute Fund Shares on an agency basis. The Distributor is a limited purpose broker-dealer. It will not underwrite directly to the public.

V. APPLICANTS' PROPOSAL

A. Operation of The Funds

1. Summary of Product Structure

Applicants have made every effort to base the design and operational structure of each Fund on the Current ETF structures, with the exception of (i) provisions that specifically relate to active portfolio management, such as Confidentiality of each Fund's portfolio and (ii) alternative mechanisms designed to facilitate arbitrage transactions similar to those that now occur in connection with Current ETFs. Each Fund, therefore, was designed to embody as many of the customary Current ETF features as possible, including (i) the creation/redemption of Creation Units at NAV calculated as of 4 pm ET, (ii) secondary market trading activity end time of 4:00 or 4:15 p.m. ET, as relevant, and (iii) 15 second calculation of IIV during the trading day. Unless otherwise expressly described in this Application, Applicants expect that each Fund and its Shares should operate and trade in a manner very similar to that of its Current ETF counterparts.

2. Capital Structure and Voting Rights; Book-Entry.

Shareholders of each Fund will have one vote per each Share owned with respect to matters regarding the Trust or the respective Fund for which a shareholder vote is required

consistent with the requirements of the Act and the rules promulgated thereunder and under Delaware law.

Like the shares of all Current ETFs, Shares of each Fund will be registered in book-entry form only and such Fund will not issue individual share certificates. The Depository Trust Company, New York, New York, a limited purpose trust company organized under the laws of the State of New York (“Depository” or “DTC”), or its nominee will be the record or registered owner of all outstanding Shares. Beneficial ownership of Shares (owners of such beneficial interests referred to herein as “Beneficial Owners”) will be shown on the records of the Depository or Depository participants (e.g., broker-dealers, banks, trust companies and clearing companies) (“DTC Participants”). Shares will be registered in book entry form only, which records will be kept by the Depository. Beneficial Owners of Shares will exercise their rights in such securities indirectly through the Depository and the DTC Participants. All references herein to owners or holders of such Shares shall reflect the rights of persons holding an interest in such securities as they may indirectly exercise such rights through the Depository and DTC Participants, except as otherwise specified. No Beneficial Owner shall have the right to receive a certificate representing such Shares. Conveyances of all notices, statements, shareholder reports and other communications from each Fund to Beneficial Owners will be at such Fund’s expense through the customary practices and facilities of the Depository and the DTC Participants.

### 3. Investment Objectives.

#### a) General

The investment objective of each Fund will be disclosed in its Prospectus and such Fund may hold, invest and trade in equity securities, futures contracts, options on futures contracts,

options, and swaps, as well as cash and cash equivalents, and other investment companies<sup>59</sup> all in accordance with the requirements of the Act and rules promulgated thereunder.

#### 4. Management of each Fund

The Board will have overall responsibility for each Fund's operations. The composition of the Board will be in compliance with the requirements of Section 10 of the Act. As discussed above, the Adviser will be responsible for the investment of each Fund's assets in accordance with its objective. Either the Adviser or the Sub-Adviser will implement a Fund's investment program.

#### 5. Listing Exchange

The Trust will list each Fund's Shares on an Exchange ("Listing Exchange"). Each Fund will comply with all applicable rules of the Listing Exchange. The Distributor will not maintain a secondary market in Shares. The principal secondary market for Shares will be the Listing Exchange. It is expected that one or more member firms of the Listing Exchange will act as a specialist ("Specialist"), or market maker in the case of NASDAQ or NYSE Arca ("Market Maker"), and maintain a market on the Listing Exchange for the Shares trading on the Listing Exchange. No Specialist or Market Maker for Shares of any Fund listed on any Exchange will be an affiliated person, or an affiliated person of an affiliated person, of the Fund, except

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<sup>59</sup> In addition to accepting and delivering shares of Index ETFs contributed to a Fund through the in-kind purchase of one or more Creation Units as described in subsections 8, 9 and 10 below, each Fund is permitted to invest in shares of Index ETFs to the extent that such investment (i) is consistent with such Fund's investment objective, registration statement, and any applicable investment restrictions and (ii) in accordance with the terms of any relevant exemption order issued to or on behalf of such Index ETF by the Commission. Such investments would be made through purchases of shares of Index ETFs in the secondary market. The Fund intends to hold Index ETF shares acquired in this manner only if doing so was in its best interest (e.g., where doing so would improve the liquidity, tradability or settlement of the Portfolio Securities, thereby potentially reducing the costs of creation and redemption activity.) For example, a Fund might invest in shares of a single Index ETF instead of shares of one or more securities in its Portfolio to decrease the costs of creation and redemption activity. The decreased costs should improve the efficiency of the creation and redemption process and facilitate more efficient arbitrage activity. *See, In the Matter of Barclays Global Fund Advisors, Investment Company Act Release No. 26626 (October 5, 2004) discussing investments in other Index ETFs.*

potentially under Section 2(a)(3)(A) or (C) of the Act solely due to ownership of Shares, as described below.

Applicants expect that the Listing Exchange will adopt listing rules for Active ETFs similar to those that have been adopted for management company Index ETFs and Disclosed Actively Managed ETFs.<sup>60</sup> Under these rules, for example, a Listing Exchange will likely consider suspension of trading in or removal from listing of a Fund if (1) there are fewer than fifty (50) beneficial holders of the Fund for thirty (30) or more consecutive trading days; or (2) such other event shall occur or condition exists which in the opinion of such Exchange makes further dealings on the Exchange inadvisable. In addition, if a Fund ceases operation and terminates, Applicants expect that the Listing Exchange will require that its shares be removed from listing. Applicants note that any such rules must be approved by the Commission's Division of Trading and Markets. As long as each Fund operates in reliance on the requested Order and in accordance with the relevant Exchange's listing rules, Shares will be listed on a Listing Exchange. Shares may also be cross-listed on one or more foreign securities markets.

#### 6. Changing or Substituting a Listing Exchange

If a Fund's Shares are de-listed from a Listing Exchange, the Applicants may seek to list the Shares on another Exchange, merge the Fund with another Fund or redeem the Shares at NAV.

#### 7. Purchases and Redemptions of Shares and Creation Units

The Funds will offer and sell Creation Units of Shares through the Distributor on a continuous basis at the NAV per Share next determined after receipt of an order in proper form. The NAV of Shares will be determined as of the close of regular trading on the NYSE ("NAV Calculation Time"), currently expected to be 4:00 p.m. ET on each day that a Fund is open

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<sup>60</sup> See, for example, AMEX Rules 1000 and 1000A, et seq., and Rules 1000B et seq., and NYSE Arca Rules 8100 et seq.

("Business Day"), which includes any day that such Fund is required to be open under Section 22(e) of the Act. Shares will be listed on the Listing Exchange and traded in the secondary market in the same manner as other equity securities and shares of Current ETFs. The price of Shares trading on the secondary market will be based on a current bid-offer market. No secondary sales will be made to brokers or dealers at a concession by the Distributor or by a Fund. Purchases and sales of Shares in the secondary market, which will not involve a Fund, will be subject to customary brokerage commissions and charges.

Applicants note that the pricing of Shares by means of bids and offers on the Listing Exchange in the secondary market is not novel. This is the method by which the shares of closed-end investment companies are priced and sold after initial issuance. This also is the method employed by all Current ETFs now trading whose individual securities trade on a Listing Exchange. Claymore ETFs, QQQs, SPDRs, MidCap SPDRs, DIAMONDS, iShares, Select Sector SPDRs, Vanguard ETFs and PowerShares have traded at, or very close to, their respective NAVs since their trading commenced. Applicants believe that the price at which a Fund's Shares trade will be disciplined by arbitrage opportunities created by the ability to purchase or redeem Creation Units at NAV, which should prevent such Shares from trading at a material premium or discount in relation to NAV in a manner similar to that of shares of Current ETFs.

#### 8. Placement of Orders to Purchase Creation Units.

##### a) General

As stated above, Applicants have determined that the procedures and operations employed by Current ETFs are well-understood and efficient and therefore Applicants intend to follow the same methodology to the fullest extent possible. Purchases and redemptions of Creation Units of each Fund will be made generally by means of an in-kind tender of specified securities ("Deposit Securities"), mostly the shares of one or more specified Index ETFs, with



any cash portion of the purchase price and redemption proceeds to be kept to a minimum.<sup>61</sup> Applicants believe that the deposit of Index ETF shares to each Fund should function in a manner similar to the “in-kind” mechanism used by Index ETFs. Also, the use of Index ETFs as Deposit Securities and Redemption Securities was chosen as a design feature of the Trust and its Funds to reduce the need to liquidate Portfolio Securities to meet redemptions of Creation Units.

All orders to purchase Creation Units must be placed with the Distributor by or through an “Authorized Participant,” which is a DTC Participant that has executed a “Participant Agreement” with the Distributor. Authorized Participants may be, but are not required to be, members of the Listing Exchange. Investors may obtain a list of Authorized Participants from the Distributor.

b) NSCC Clearing Process and DTC Process.

Purchase orders for creations and redemptions of each Fund’s Creation Units will be processed either through the enhanced clearing process or through the manual clearing process currently available to Current ETFs as described immediately below. The enhanced clearing process is available only to those DTC Participants that also are participants in the Continuous Net Settlement (“CNS”) System of the National Securities Clearing Corporation (“NSCC”), a clearing agency registered with the Commission and affiliated with DTC. The NSCC/CNS system was enhanced specifically to effect purchases and redemptions of domestic Current ETF securities, such as SPDRs and Claymore ETFs and will be utilized in connection with the Shares of the Funds. This enhanced clearing process (“NSCC Clearing Process”) simplifies the process of transferring a basket of securities between two parties by treating all of the securities that comprise the basket as a single unit.

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<sup>61</sup> Applicants have been advised that the Sub-Adviser of each Initial Fund currently holds shares of Index ETFs as equitized cash in several of the portfolios it currently manages and anticipates doing the same for the Initial Funds.

By contrast, the manual clearing process (“DTC Process”), which is available to all DTC participants, involves a manual line-by-line movement of each securities position. Because the DTC Process involves the movement of securities individually, while the NSCC Process can act on instructions regarding the movement of one unitary basket which automatically processes the movement of the requisite number of individual securities, DTC will charge a Fund more than NSCC to manually settle a purchase or redemption of Creation Units.

c) Transaction Fees

The Fund will recoup the settlement costs charged by NSCC and DTC by imposing a “Transaction Fee” on investors purchasing or redeeming Creation Units. For this reason, investors purchasing or redeeming through the DTC Process generally will pay a higher Transaction Fee than will investors doing so through the NSCC Process. The Transaction Fee may also recoup other expenses incurred in the transfer of Deposit Securities to a Fund in connection with a purchase of Creation Units, as well as the transfer by a Fund of Redemption Securities in connection with a redemption of Creation Units; such expenses may include custody fees, brokerage costs, and the like. The Transaction Fee will be limited to amounts that have been determined by the Adviser to be appropriate. The purpose of the Transaction Fee is to minimize the effect on the existing shareholders of the Funds from the dilutive costs associated with the purchase and redemption of Creation Units.<sup>62</sup> Transaction Fees will differ for each Fund, depending on the transaction expenses related to each Fund’s Deposit and Redemption Securities. Every purchaser of a Creation Unit will receive a Prospectus that contains complete disclosure about the Transaction Fee, including the maximum amount of the Transaction Fee

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<sup>62</sup> Where a Fund permits an in-kind purchaser to deposit cash in lieu of depositing one or more Deposit Securities, the purchaser may be assessed a higher Transaction Fee to offset the transaction cost to the Fund of buying those particular Deposit Securities.

charged by the Fund. The method of calculating the Transaction Fees will be fully disclosed in the Trust's SAI.

d) Timing and Transmission of Purchase Orders

All orders to purchase Creation Units, whether through the NSCC Process or the DTC Process, must be received by the Distributor no later than the NAV Calculation Time, generally 4:00 p.m. ET on the date the order is placed ("Transmittal Date") in order for the purchaser to receive the NAV determined on the Transmittal Date. The Distributor or its designee will maintain a record of Creation Unit purchases and will send out confirmations of such purchases. The Distributor or its designee will transmit all purchase orders to the relevant Fund. A Fund may reject any order that is not in proper form. After a Fund has accepted a purchase order and received delivery of the Deposit Securities and any accompanying cash payment, NSCC or DTC, as the case may be, will instruct the Fund to initiate "delivery" of the appropriate number of Shares to the book-entry account specified by the purchaser.<sup>63</sup> The Distributor will furnish a Prospectus and a confirmation to those purchasing Shares.

9. Payment for Creation Units

e) General

Persons purchasing Creation Units from a Fund must make an in-kind deposit of Deposit Securities together with an amount of cash specified by the Adviser ("Cash Requirement"), plus the applicable Transaction Fee. The Deposit Securities and the Cash Requirement collectively are referred to as the "Creation Deposit." The Cash Requirement is a cash payment designed to ensure that the NAV of a Creation Deposit is identical to the NAV of the Creation Unit it is used

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<sup>63</sup> Creation Units may be issued to an Authorized Participant notwithstanding the fact that the corresponding Deposit Securities have not been received in part or in whole, in reliance on the Authorized Participant's undertaking to deliver the missing Deposit Securities as soon as possible, which undertaking shall be secured by the Authorized Participant's delivery and maintenance of collateral. The Authorized Participant Agreement will permit the Fund to buy the missing Deposit Securities at any time and will subject the Authorized Participant to liability for any shortfall between the cost to the Fund of purchasing the securities and the value of the collateral. The SAI may contain further details relating to such collateral procedures.

to purchase. The Cash Requirement will be the amount equal to the difference between the NAV of a Creation Unit and the market value of the Deposit Securities.<sup>64</sup>

The Adviser or the Sub-Adviser will make available through NSCC or the Distributor on each Business Day, prior to the opening of trading on the Listing Exchange (expected to be 9:30 a.m. ET), a list of names and the required number of shares of each Deposit Security to be included in the Creation Deposit for each Fund.<sup>65</sup> This Creation Deposit will apply to all purchases of Creation Units until a new Creation Deposit composition is announced. As discussed above, Applicants expect that specified Index ETFs will be designated as Deposit Securities. The Adviser or Sub-Adviser also will make available on a daily basis information about the previous day's Cash Requirement. The Adviser or Sub-Adviser will make this information available through NSCC or the Distributor along with the information about the Deposit Securities.

Creation Deposits placed using the DTC Process must be delivered through an Authorized Participant. Authorized Participants wishing to place an order creating Creation Units to be effected using the DTC Process must state that they are not using the NSCC Clearing Process and that the creation of Creation Units will instead be effected through a transfer of securities and cash. The Creation Deposit transfer must be ordered on the Transmittal Date in a timely fashion so as to ensure the delivery of the requisite number of Deposit Securities through DTC to the account of the Fund by no later than 11:00 a.m. ET of

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<sup>64</sup> If the market value of the Deposit Securities is greater than the NAV of a Creation Unit, then the Cash Requirement will be a negative number, in which case the Cash Requirement will be paid by a Fund to the purchaser, rather than vice-versa.

<sup>65</sup> The Advisor, the Sub-Adviser and the Distributor will have each have adopted a Code of Ethics as required under rule 17j-1 of the Act, which contains provisions reasonably necessary to prevent Access Persons (as defined in Rule 17j-1) from engaging in any conduct prohibited in Rule 17j-1. In addition, the Advisor and the Sub-Adviser, as required under Section 204A of the Advisers Act, will have adopted policies and procedures that are reasonably designed, taking into account the nature of its business, to prevent the misuse, in violation of the Advisers Act or the Exchange Act or the rules or regulations thereunder of material non-public information by the Advisor or the Sub-Adviser or any associated person.

the next Business Day immediately following such Transmittal Date. The cash equal to the Cash Requirement must be transferred directly to each Fund through the Federal Reserve Bank wire transfer system in a timely manner so as to be received by such Fund no later than 2:00 p.m. ET on the next Business Day immediately following the Transmittal Date. An order to create Creation Units using the DTC Process is deemed received by the Distributor on the Transmittal Date if (i) such order is received by the Distributor not later than the NAV Calculation Time on such Transmittal Date; and (ii) all other procedures set forth in the Participant Agreement are properly followed. However, if a Fund does not receive both the requisite Deposit Securities and the Cash Requirement in a timely fashion on the next Business Day immediately following the Transmittal Date, such order will be canceled. Upon written notice to the Distributor, such canceled order may be resubmitted the following Business Day using the Creation Deposit for that Business Day. The delivery of Creation Units purchased through the DTC Process will occur within the normal settlement cycle, currently no later than the third (3rd) Business Day following the day on which the creation order is deemed received by the Distributor.

#### 10. Redemption of Creation Units

Just as Shares can be purchased from each Fund only in Creation Units, such Shares similarly may be redeemed only if tendered in Creation Units (except in the event such Fund is liquidated). To redeem, an investor must accumulate enough Shares to constitute a Creation Unit. Redemption requests must be placed by or through an Authorized Participant. As required by law, redemption requests in good order will receive the NAV next determined after the request is received. Therefore, all redemption requests received by each Fund prior to the NAV Calculation Time will receive the NAV determined immediately thereafter, whereas all redemption requests received by such Fund after the NAV Calculation Time will receive the NAV calculated on the

immediately following Business Day. Procedures for redemptions are analogous (in reverse) to those for purchases of Creation Units, except that redemption requests are made by an Authorized Participant directly to a Fund and are not made through the Distributor.<sup>66</sup> Any such request for redemption on a Transmittal Date must clearly state whether the NSCC Clearing Process or the DTC Process will be used and must state exactly the time when the transfer of the requisite Shares and cash is to be effected.

In the case of a redemption request made through the DTC Process, such request must be preceded or accompanied by the requisite number of Shares of each Fund specified, which delivery must be made through DTC to such Fund no later than 11:00 a.m. ET on the next Business Day immediately following the Transmittal Date and all other procedures set forth in the Participant Agreement must be properly followed. When using the DTC Process, an in-kind redemption involves delivery of Shares in Creation Units from the entity placing the request to a Fund corresponding with a delivery of the requisite amounts of each of the underlying Portfolio Securities from such Fund to the entity placing the redemption request. The DTC Process involves a non-automatic line-by-line position movement of the underlying Portfolio Securities and Fund Shares, therefore each Fund and the entity placing the request will be required to reconcile delivery and receipt of the correct share amounts for the transfer of Shares and the corresponding transfer of each underlying Portfolio Security. Transmission of the Cash Requirement and the Transaction Fee (which includes the processing, settlement and clearing costs associated with securities transfers) must be accomplished in a manner acceptable to the Fund, normally through a DTC cash transfer system. An entity redeeming Shares in Creation Unit Aggregations using the DTC Process will be required to pay a higher Transaction Fee than

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<sup>66</sup> See footnote 67, *infra*.

would have been charged had the redemption been effected through the NSCC Clearing Process, as disclosed in each Fund's Prospectus.

Shares in Creation Units will be redeemable on any Business Day for a specified basket of securities ("Redemption Securities"). Applicants expect that the Redemption Securities received by a redeeming investor in most cases primarily will be specified Index ETFs, the same as the Deposit Securities required of investors purchasing Creation Units on the same day.<sup>67</sup>

Depending on whether the NAV of a Creation Unit is higher or lower than the market value of the Redemption Securities, the redeemer of a Creation Unit will either receive from, or pay to, the Fund, a balancing cash amount analogous to the Cash Requirement. The redeeming investor also must pay to each Fund a Transaction Fee to cover the costs of moving the securities from one account to another, such as sub-custodian and other transfer fees. As mentioned above, each Fund may make redemptions partly in cash in lieu of transferring one or more Redemption Securities to a redeeming investor if such Fund determines, in its discretion, that such alternative is warranted.<sup>68</sup>

#### 11. Pricing of Shares

The price of Shares trading in the secondary market will be based on a current bid/offer market. The price of Shares, like the price of all traded securities, including Current ETFs, is subject to factors such as supply and demand, although Applicants believe that the market value of Shares primarily should rise or fall based on changes in the current value of each Fund's underlying assets, as estimated by the Fund's IIV as described below. Shares,

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<sup>67</sup> There may be circumstances, however, where the Deposit Securities and Redemption Securities could differ from each other. This flexibility to prescribe different baskets for creation and redemption promotes efficient portfolio management and lowers a Fund's brokerage costs, and thus is in the best interests of such Fund's shareholders.

<sup>68</sup> Each Fund also may decide, on any given day, to provide all redeeming shareholders with cash proceeds, rather than a prescribed basket of securities, if doing so would benefit such Fund and its investors. If a redeeming investor must take (or chooses to take) cash in lieu of one or more Redemption Securities, the investor will be required to use the DTC Process rather than the NSCC Process.

available for purchase or sale on an intra-day basis on the Listing Exchange, will not have a fixed relationship either to the previous day's NAV nor the current day's NAV. Prices on the Listing Exchange therefore may be below, at, or above the most recently calculated NAV of such Shares. No secondary sales will be made to brokers or dealers at a concession by the Distributor or by any Fund. Transactions involving the sale of Shares on any Exchange will be subject to customary brokerage commissions and charges.

Applicants believe that the existence of a continuous trading market on the Listing Exchange for Shares, together with the publication by the Listing Exchange of the Tracking Portfolio and the current market value of the IIV every 15 seconds should keep the intra-day prices for the individual shares of each Fund close to the IIV due to arbitrage. Given the mechanics of the AMEX Propriety Methodology, Applicants believe that the IIV should be very close to the intra-day value of each Fund's holdings, hence the intra-day prices of the Shares should also be close to NAV.

Applicants expect that the pricing of Shares by means of bids and offers on the Listing Exchange in the secondary market will be similar to the pricing of Shares of many Current ETFs presently trading. The Applicants are aware of the marketing success of Claymore ETFs, QQQs, SPDRs, MidCap SPDRs, DIAMONDS, iShares, Vanguard ETFs and Select Sector SPDRs products, the individual securities of which are traded on U.S. security markets, but which also permit on a continuous basis the redemption of specified aggregations of such individual securities. Claymore ETFs, QQQs, SPDRs, MidCap SPDRs, DIAMONDS, iShares, Select Sector SPDRs and Vanguard ETFs have traded at, or very close to, their respective NAVs, since trading commenced.<sup>69</sup> Applicants believe that the design of each Fund as an Active ETF is

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<sup>69</sup> A Comprehensive Analysis of ETF Premiums and Discounts", presented by Dr. Robert F. Engle, NYU, and Dr. Debo Sarkar, Analysis Group/Economics (January 14, 2002). Applicants understand that the sole exception is the experience of the Malaysia (Free) Shares MSCI Series, which announced that it was suspending creations and discouraging redemptions following the imposition of capital controls by the Malaysian government in



similar to that of Current ETFs in that it also provides a daily redemption feature and, hence affords significant benefits over both a traditional closed-end structure and a closed-end fund that makes periodic repurchase of its shares pursuant to Rule 23c-3.

B. Likely Purchasers of Shares

Applicants believe there will be three main types of market participants interested in buying and selling Shares in Creation Units:

- investors who wish to participate in an active manager's fund, and who choose Shares because they are a cost effective means to do so and/or because they can be bought and sold intra-day, unlike the securities of a traditional actively managed open-end investment company;
- arbitrageurs who seek to profit from any meaningful premium or discount in the market price of individual Shares on the Exchange versus the IIV of those Shares; and
- the Specialist or Market Maker, who may from time to time find it appropriate to purchase or redeem Creation Units in connection with its market-making activities on the Listing Exchange.

Applicants expect that secondary market purchasers of Shares will include both institutional and retail investors as is the case for Current ETFs.

C. Disclosure Documents

Section 5(b)(2) of the Securities Act makes it unlawful to carry or cause to be carried through interstate commerce any security for the purpose of sale or delivery after sale unless accompanied or preceded by a statutory prospectus. Although Section 4(3) of the Securities Act excepts certain transactions by dealers from the provisions of Section 5 of the Securities Act, Section 24(d) of the Act disallows such exemption for transactions in redeemable securities issued by a unit investment trust or an open-end management company if any other security of

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September 1998. Since the time of that announcement, the shares of the Malaysia (Free) Shares MSCI Series have traded on the American Stock Exchange at substantially wider spreads to NAV than those shares had traded prior to such announcement.

the same class is currently being offered or sold by the issuer or by or through an underwriter in a public distribution.

Because Creation Units of each Fund will be redeemable, will be issued by an open-end management company and will be continually in distribution, the provisions cited above require the delivery of a statutory prospectus prior to or at the time of the confirmation of each secondary market sale involving a dealer. Applicants will arrange for sufficient copies of each Fund's Prospectus to be made available to the Distributor, who will in turn will coordinate the distribution of Prospectuses to broker-dealers. It will be the responsibility of the broker-dealers to provide a Prospectus for every secondary market purchaser of Shares of each Fund.

Each Fund's Prospectus will clearly explain that the Fund intends to maintain a policy of Confidentiality with respect to its Portfolio Securities and therefore it will not describe or publish its Portfolio Securities any more frequently than is required for traditional mutual funds. Also, each Fund's Prospectus will explain the AMEX Proprietary Methodology, the Tracking Portfolio, the IIV and the arbitrage mechanism in effect for the Active ETF. In addition, each Fund's Prospectus will describe the method by which the Tracking Portfolio is created and explain that its sole purpose is to help investors and Liquidity Providers assess the behaviors and risks of the Fund and thus facilitate the arbitrage mechanism. Each Fund's Prospectus will also compare the differences between its Deposit/Redemption Securities and the Deposit/Redemption Securities of Current ETFs. Each Fund's Prospectus will clearly state that the IIV posted every 15 seconds is not the Fund's NAV and that there is likely to be more tracking error than typically exists with Current ETFs.

Further, each Fund's Prospectus will disclose certain legal risks that are unique to persons purchasing Creation Units from such Fund. Because new Shares may be issued on an ongoing basis, a "distribution" of Shares could be occurring at any time. Each Fund's Prospectus will

caution broker-dealers and others that some activities on their part, depending on the circumstances, may result in their being deemed participants in the distribution of Shares in a manner that could render them statutory underwriters and subject them to the prospectus delivery and liability provisions of the Securities Act. For example, a broker-dealer firm and/or its client may be deemed a statutory underwriter if it purchases Creation Units from the Fund, breaks them down into the constituent Shares, and sells those Shares directly to customers, or if it chooses to couple the creation of a supply of new Shares with an active selling effort involving solicitation of secondary market demand for Shares. Each Fund's Prospectus will state that whether a person is an underwriter depends upon all of the facts and circumstances pertaining to that person's activities. Each Fund's Prospectus also will caution dealers who are not "underwriters" but are participating in a distribution (as contrasted to ordinary secondary trading transactions), and thus dealing with Shares that are part of an "unsold allotment" within the meaning of Section 4(3)(C) of the Securities Act, that they would be unable to take advantage of the prospectus delivery exemption provided by Section 4(3) of the Securities Act.

Finally, each Fund's Prospectus also will disclose a description of the Adviser's and Sub-Adviser's investment strategies; the manner in which Creation Units are purchased and redeemed; the manner in which Shares will be traded on the Listing Exchange, including application of trading halt procedures; the composition and frequency of net dividend distributions; and the actions, if any, that would be taken by the Fund if its Shares are de-listed. In addition, it will provide the website address of the Adviser and Sub-Adviser so that investors interested in learning more about the Adviser and Sub-Adviser and/or the other mutual funds under its management can do so. In addition, it will clearly disclose, among other things, that Shares are not redeemable individually, and that an investor selling Shares on the secondary market may incur brokerage commissions when selling the Shares and may receive less than the

NAV of the Shares. Further, each Fund's Prospectus will provide the Website address where, among other things, information about the premiums and discounts at which the Fund's Shares have traded will be published. Each Fund's Prospectus will indicate that the Fund's SAI may be obtained, without charge, from the investor's broker or from the Distributor and may be accessed through the Commission's EDGAR system as well as the Website.

D. Sales and Marketing Materials

The Applicants will take such steps as may be necessary to avoid confusion in the public's mind between the Trust and the Funds and a traditional "open-end investment company" or "mutual fund", and intend to follow Current ETF practices in this regard. For example, with respect to disclosure in the Prospectus concerning the description of each Fund and its Shares, the Trust and each Fund will observe the following policies: (1) the term "mutual fund" will not be used except to compare and contrast the Trust or a Fund with conventional mutual funds; (2) the term "open-end management investment company" will be used in the Prospectus only to the extent required by Form N-1A and this phrase will not be included on the Prospectus cover page or summary; (3) the front cover page of the Prospectus and the Prospectus summary will include a distinct paragraph or paragraphs setting forth the fact that Shares will be listed on the Listing Exchange and will not be individually redeemable; and (4) the Prospectus will disclose that the owners of Shares may acquire them from the Fund, and tender them for redemption to the Fund, in Creation Units only. The detailed explanation of the issuance and redemption procedures for Creation Units will be in the SAI to the maximum extent possible. In addition, the Applicants will take steps to avoid possible confusion between the Trust and each Fund and a Current ETF. For example, the Trust and the Funds will use terms such as "active ETF" or "actively managed ETF" and will refrain from using the terms "Index ETF" or "Disclosed" or "Transparent Actively Managed ETF" except to compare and contrast the Trust or a Fund with Current ETFs.

The advertising and marketing of the Trust and each Fund will be conducted in the same manner as that for existing Current ETFs; neither the Trust (with respect to a Fund) nor any Fund will be advertised or marketed or otherwise “held out” as a traditional open-end investment company or a mutual fund. To that end, the designation of the Trust and the Funds in all marketing materials relating to the Funds will be limited to the terms “active exchange-traded fund,” “active ETF,” “investment company,” “fund” and “trust” without reference to an “open-end fund” or a “mutual fund,” except to compare and contrast the Trust and the Fund with conventional open-end investment companies. All marketing materials that describe the features or method of obtaining, buying or selling Creation Units, or Shares traded on the Listing Exchange, or refer to redeemability, will prominently disclose that Shares are not individually redeemable shares and will disclose that the owners of Shares may acquire those Shares from the Funds, or tender Shares for redemption to the Funds in Creation Units only. Each Fund’s Prospectus will prominently disclose that Shares are not individually redeemable and that owners of Shares may acquire those Shares from the Fund, or tender such Shares for redemption, to the Fund in Creation Units only. The same approach will be followed in connection with the SAI, shareholder reports and investor educational materials posted on the Website, issued or circulated in connection with Shares. Each Fund’s Prospectus will also state that, while Creation Units of Shares may be redeemed, brokerage and other costs may be associated with aggregating a sufficient number of Shares to redeem them in a Creation Unit and will indicate the estimated cost of a Creation Unit of each Fund as of a recent date, and will refer to the SAI for details. Applicants also intend to characterize the management strategy used by each Fund as “active” or “actively managed” in the Prospectus, SAI, Product Description, sales and marketing materials. Applicants intend to describe, and focus a potential investor’s attention on, the Adviser’s and Sub-Adviser’s (if any) investment objective and strategies. Likewise, discussions of the

investment process used by the Adviser and/or Sub-Adviser will characterize the investment strategies as “active” and all of the documents mentioned above will prominently disclose the investment objective of each Fund. Finally, all materials will clearly explain that a Fund’s Portfolio Securities will not be described or published any more frequently than is required for traditional mutual funds.

E. Availability of Information Regarding Shares

In addition to the list of names and amount of each security constituting the current Deposit Securities of the Creation Deposit, it is intended that, on each Business Day, the Cash Requirement effective as of the previous Business Day, per outstanding Share of each Fund, will be made available. Neither the Trust nor any Fund will be involved in, or responsible for, the calculation or dissemination of any such amount and will make no warranty as to its accuracy. In addition, the following information will be disseminated: (i) continuously throughout the regular trading hours on the relevant Listing Exchange (anticipated to be 9:30 a.m. to 4:00 or 4:15 p.m. ET, as relevant) the market value of Shares by the Listing Exchange over the Consolidated Tape, and (ii) every 15 seconds throughout such regular trading hours, the IIV of Shares.<sup>70</sup> Comparing these two figures should permit arbitrageurs, investors and other market participants to determine whether, and to what extent, Shares are selling at a premium or a discount to IIV.<sup>71</sup> The IIV, based on the market price of the Tracking Portfolio’s component securities, will be updated and disseminated every 15 seconds over the Consolidated Tape and may also be disseminated

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<sup>70</sup> The Applicants understand that NASDAQ listed securities are subject to the NASDAQ Unlisted Trading Privileges Plan (“UTP Plan”), which provides for dissemination of quotation and trade information for NASDAQ securities, whereas securities from other Listing Exchanges (e.g., the NYSE or the AMEX) are subject to the Consolidated Tape Association Plan (“CTA Plan”). The UTP Plan and the CTA Plan were each approved by the Commission pursuant to the provisions of Section 11A of the Exchange Act.

<sup>71</sup> The Applicants understand that NASDAQ disseminates market-traded fund valuation information via its NASDAQ Index Dissemination Service data feed. This information is currently disseminated to the public through many of the major market data vendors, including Thomson Financial, Reuters, Bloomberg, and Standard & Poor’s Comstock.

through organizations authorized by the Calculation Agent each Business Day.<sup>72</sup> Also, each Fund will make available on a daily basis through NSCC the names and required number of shares of each of the Deposit Securities in a Creation Unit, as well as information regarding the Cash Requirement. The NAV for the Fund will be calculated and disseminated daily.

As discussed herein, the Website, accessible to all investors at no charge, will publish the current version of the Prospectus and SAI, the Tracking Portfolio for each Fund, as well as additional quantitative information that is updated on a daily basis, including daily trading volume, closing price and closing NAV for such Fund. Also, Applicants expect that the Listing Exchange will disseminate a variety of data with respect to each Fund on a daily basis; information with respect to recent NAV, net accumulated dividend, final dividend amount to be paid, Shares outstanding, estimated cash amount and total cash amount per Creation Unit will be made available prior to the opening of the Listing Exchange.

Further, as discussed in Section IV.D above, the closing prices of the component securities of each Fund's Tracking Portfolio are readily available from, as applicable, the relevant markets, automated quotation systems, published or other public sources or on-line information services such as Bloomberg or Reuters.

F. Qualification as a Regulated Investment Company

The Trust and each Fund intend to qualify for and to elect treatment as a RIC for U.S. federal income tax purposes, with the result that each Fund effectively will be treated as if it were a separate corporation and will generally not be subject to U.S. federal income tax on its income to the extent it distributes substantially all of its investment company taxable income and net capital gains and satisfies other applicable requirements of the Code. Among other things,

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<sup>72</sup> Applicants intend that 11V will be disseminated only during U.S. market hours; such values will be updated and disseminated every 15 seconds each Business Day throughout regular U.S. market hours.

each Fund must meet certain diversification tests imposed by the Code in order to satisfy RIC requirements.

The Trust on behalf of each Fund will have the right to reject an order for purchase of Creation Units of Shares upon an in-kind deposit of Deposit Securities if the purchaser (or a group of related purchasers) would, upon obtaining the Shares so ordered, own eighty percent (80%) or more of the outstanding shares of such Fund and if, in consequence, pursuant to Section 351 of the Code, such Fund would have a basis in the Deposit Securities different from the market value of such Deposit Securities on the date of deposit. Each Fund will have the right to require and rely upon information necessary to determine beneficial share ownership for purposes of the eighty percent (80%) determination or in lieu of this, accept a certification from a broker-dealer who is a member of Financial Industry Regulatory Authority ("FINRA") that the cost basis of the securities deposited is essentially identical to their market value at the time of deposit.

G. Operational Fees and Expenses

Applicants intend that each Fund will provide cost efficient investment opportunities to investors, and at lower fee and expense ratios, than many traditional actively managed mutual funds. All expenses incurred in the operation of each Fund will be borne by the Trust and allocated to such Fund, except to the extent specifically assumed by the Adviser or Sub-Adviser, the Fund's administrator or sub-administrator(s), if any, or some other party. Operational fees and expenses incurred by the Trust in connection with each Fund will be allocated and charged to such Fund. Such expenses may include, but will not be limited to, the following: investment advisory fees, custody fees, brokerage commissions, registration fees of the Commission, the Exchange listing fees, fees of the securities lending agent, if any, and other costs properly payable by each Fund, fees and expenses of Board members who are not "interested persons" (as



defined in Section 2(a)(19) of the Act) (“independent trustees”) of the Trust, legal and audit fees, certain licensing fees, administration and accounting fees, Prospectus and SAI costs, semi-annual and annual reports, proxy statements and other documents required for regulatory purposes and for their distribution to existing shareholders, transfer agent fees and insurance premiums. All operational fees and expenses incurred by the Trust will be accrued and allocated to each Fund on a daily basis, except to the extent expenses are specifically assumed by the Adviser or some other party.

Each Fund’s investment advisory contract with the Adviser and the fees payable thereunder will be approved pursuant to Section 15(c) of the Act and comply with the provisions of the Advisers Act. For its services, the Adviser will receive an advisory fee, accrued daily and paid monthly, on an annualized basis, of a specified percentage of the average daily net assets of each Fund. The advisory fee payable for each Fund pursuant to investment advisory contract will be disclosed in its Prospectus. The Adviser will pay fees to any Sub-Adviser out of the fees the Adviser receives pursuant to the advisory contract. Each Fund will also engage a transfer agent, dividend disbursing agent, administrator and custodian and may engage other service providers to furnish certain administrative, fund accounting, transfer agent and custodial services to such Fund, and the fees paid to these services providers may be based on a percentage of the average daily net assets of the respective Fund. These service providers may in turn delegate certain functions to others, such as a subadministrator or subcustodian, who will be paid by each Fund’s service providers. The Adviser, Sub-Adviser, or any other service provider for each Fund may agree to cap expenses or to make full or partial fee waivers for a specified or indefinite period of time.

#### H. Shareholder Transaction Expenses

As stated above in Section III.A, no sales charge will be imposed on sales of Shares of any Funds. Also, although authorized to do so, each Fund currently does not intend to impose or pay Rule 12b-1 distribution fees.<sup>73</sup> As is the case for all equity securities, investors buying and selling Fund Shares in the secondary market can expect to pay usual and customary brokerage commissions in connection with such transactions.

#### I. Shareholder Reports

With each distribution by each Fund, the Trust will furnish to the DTC Participants for distribution to Beneficial Owners of Shares of such Fund a statement setting forth the amount being distributed, expressed as a dollar amount per Share. Beneficial Owners also will receive annually notification as to the tax status of each Fund's distributions.

Promptly after the end of each fiscal year, the Trust will furnish to the DTC Participants, for distribution to each person who was a Beneficial Owner of Shares of each Fund at the end of the fiscal year, an annual report of such Fund containing financial statements audited by an independent registered public accounting firm of nationally recognized standing and such other information as may be required by applicable laws, rules and regulations. Copies of annual and semi-annual shareholder reports will also be provided to the DTC Participants for distribution to Beneficial Owners of Shares.

#### J. No Dividend Reinvestment Program

The Trust will not offer a dividend reinvestment program in connection with the Funds and will not discuss or make mention of such a program in its Prospectus.

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<sup>73</sup> Each Fund reserves the right to impose 12b-1 fees in the future and will follow the appropriate procedures and make necessary disclosure in its Prospectus and/or SAI and other materials if and when such fees are imposed.

## VI. IN SUPPORT OF THE APPLICATION

### A. Summary of the Application for Relief

Applicants seek the Order from the Commission for exemptive relief permitting: (1) the Fund to issue Shares that are redeemable in Creation Units only; (2) secondary market transactions in Shares at negotiated prices, rather than at the current offering price described in the Funds' Prospectus; and (3) affiliated persons of each Fund to deposit securities into, and receive securities from the Fund in connection with the purchase and redemption of Creation Units, all as more fully set forth herein.

As mentioned in footnote 3, supra., Applicants note that the Claymore Index ETF Order also grants 12(d)(1) Relief to permit certain registered management investment companies and UITs "outside of the same group of investment companies" as the Claymore Exchange-Traded Fund Trust series to acquire shares of such series in excess of such limitation. Applicants intend that the Trust and its Funds described herein also will rely upon the Claymore Index ETF Order to the same extent and for the same purposes, because the Trust and its Funds belong to the same "group of investment companies" as the Claymore Exchange-Traded Fund Trust series.

The Relief as specified below is requested pursuant to Section 6(c) of the Act, which provides that the Commission may exempt any person, security or transaction or any class of person, securities or transactions from any provision of the Act:

if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of... [the Act].

Applicants believe that Shares of the Funds will afford significant benefits to investors which are appropriate in the public interest. Among other benefits, availability of Shares would:

(i) provide investors with an opportunity to receive returns in excess of each Fund's benchmark which may be generated by the Adviser and/or Sub-Adviser, thus providing increased investment

opportunities which should encourage diversified investment; (ii) provide a lower cost, actively managed pooled security for small and middle-sized accounts of individuals and institutions that would be available at intraday prices reflecting minute-by-minute market conditions rather than only closing prices; (iii) provide a security that should be freely available in response to market demand; (iv) provide competition for comparable products available in U.S. markets; (v) attract capital to the U.S. equity market; (vi) facilitate the implementation of actively managed investment strategies and techniques and (vii) provide an investment vehicle that may be more tax efficient than most traditional mutual funds or closed-end funds.

The Commission has indicated that Section 6(c) permits it to exempt “particular vehicles and particular interests” from provisions of the Act that would inhibit “competitive development of new products and new markets offered and sold in or from the United States.” Investment Company Act Release No. 17534 (June 15, 1990), at 84. The Shares proposed to be offered would provide a new market-traded investment company product providing an alternative to traditional actively managed funds which will be available at market prices throughout the entire trading day. As such, the Applicants believe the Shares of the Funds are deserving of exemptive relief under Section 6(c).

Applicants have made every effort to achieve their stated objectives in a manner consistent with existing statutory and regulatory constraints and within the substantive limits of exemptive relief previously granted to other Applicants, especially those granted to Current ETFs.

Applicants have concluded that in-kind redemption of Creation Units of the Funds to the maximum extent practicable as described herein will be essential in order to reduce the need for selling securities of each Fund’s portfolio to meet redemptions, minimize transfer and other portfolio costs and alleviate the inappropriate taxation of ongoing shareholders.

With respect to the Relief specified below regarding Section 17(a)(1) and 17(a)(2), exemptive relief is requested pursuant to Sections 6(c) and 17(b), which provide that the Commission may approve the sale of securities to an investment company and the purchase of securities from an investment company, in both cases by an affiliated person of such company, if the Commission finds that:

“the terms of the proposed transaction, including the consideration to be paid or received, are reasonable and fair and do not involve any overreaching on the part of any person concerned, the proposed transaction is consistent with the policy of each registered investment company concerned .... and the proposed transaction is consistent with the general purposes of [the Act].”

In each case, Creation Units will be sold and redeemed by the Trust at their NAV. The Creation Deposit for each Fund is based on a standard applicable to all and valued in the same manner in all cases. Applicants believe that such transactions do not involve “overreaching” by an affiliated person. Accordingly, the Applicants assert the proposed transactions described herein meet the Section 6(c) standards for Relief, as well as the Section 17(b) standards for relief because the terms of such proposed transactions, including the consideration to be paid or received for the Creation Units, are reasonable and fair and do not involve overreaching on the part of any person concerned; the proposed transactions will be consistent with the Trust’s policy and that of the Funds as described herein; and are consistent with the general purposes of the Act.

Applicants note that the Commission has had an opportunity to review the operation of Index ETFs for fifteen years to determine that they would not lead to the abuses that the Act addresses. Initially, the Commission granted the SuperTrust Order in 1990, permitting the first market-traded open-end investment trust to operate. Next, the Commission granted the SPDR Order in October 1992, permitting the first exchange-traded unit investment trust to operate. In 1996, the Commission granted the WEBS Order and CountryBaskets Order permitting the first

Management ETFs to operate. Presently, more than 600 of these products are actively traded on national markets, including the Claymore ETFs as well as SPDRs, DIAMONDS, iShares, Select Sector SPDRs, Vanguard ETFs, Rydex and PowerShares.

B. Benefits of the Proposal

Index ETFs have allowed both retail and institutional investors to trade a standardized portfolio of securities in a size comparable to a share of common stock. Trading in these “basket” products is an important investment strategy, due in part to the widely acknowledged benefits of diversification and in part to the attraction of baskets. Baskets are selected from a market segment or industry sector or pursuant to a portfolio manager’s investment objectives that investors want to incorporate into their portfolio to express a specific investment theme, to participate in an economic/investment trend or to provide a hedge for their exposure to other investments. The popularity of Index ETFs currently trading including but not limited to the Claymore ETFs, as well as SPDRs, DIAMONDS, Select Sector SPDRs, iShares, QQQs, all of which are basket products, is ample testimony to the fact that this basket structure has proven attractive to investors.

Applicants believe that the Funds, structured as Active ETFs, should provide additional investment opportunities to those offered by Current ETFs described above, the principal one being active management without portfolio disclosure.<sup>74</sup> There has been an ongoing dialogue in academia, the marketplace and the press about the advantages and disadvantages of passive portfolio management versus active portfolio management. Clearly, Index ETFs have provided investors with an opportunity to buy, hold and sell shares of funds that are passively managed. Nevertheless, the overwhelming majority of traditional mutual funds for sale in the U.S. are

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<sup>74</sup> Although Disclosed Actively Managed ETFs have not yet had time to generate performance and trading data, Applicants believe that they will behave more like Index ETFs than like typical actively managed mutual funds with undisclosed portfolios.

actively managed because most investors are not persuaded by the case for stock indexing. Indeed, even some investors who purchase index mutual funds and/or Index ETFs nevertheless allocate some portion of their available assets to an active strategy, principally by investing in actively managed mutual funds. These investors believe that an active manager may be able to provide portfolio returns in excess of those provided by a comparable index fund or as compared to the fund's benchmark. Managers of actively managed mutual funds employ a variety of investment strategies and techniques to provide such portfolio returns and most use Confidentiality to protect or enhance their portfolio transactions. Depriving them of the ability to trade without daily portfolio disclosure is seen as a major hindrance in achieving maximum portfolio returns. Investors interested in acquiring shares of active mutual funds managed without Transparency, therefore, have thus far have not been able to acquire shares of an actively managed portfolio structured as an ETF; granting the Relief requested herein should provide increased investment opportunities for such persons.

#### 1. Intra-Day Trading

Traditional open-end mutual funds do not provide their investors the ability to trade throughout the day. In contrast, Shares, which will be listed on a Listing Exchange, will trade throughout the Listing Exchange's regular trading hours. In distinction to closed-end investment companies, Applicants believe that the price at which Shares trade will be disciplined by arbitrage opportunities created by the option to continually purchase or redeem Shares in Creation Units, which should help prevent Shares from trading at a material discount or premium in relation to their IIV, which in turn should be close to their NAV.<sup>75</sup> The continuous ability to purchase and redeem Shares in Creation Units also means that Share prices in secondary trading should not ordinarily be greatly affected by limited or excess availability.

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<sup>75</sup> Applicants expect that each Fund's NAV should be close to the Fund's IIV; see Section I.F., *supra*.

## 2. Maintaining a Competitive Position in the Global Securities Markets

To maintain a competitive position in global securities markets, U.S. participants must continue to respond to new developments and encourage the development of new products. Innovative financial vehicles such as those to be offered by the Trust will provide investors new opportunities for investment. By providing a wide range of investors with a U.S. exchange-traded fund that also permits the investor to participate in an active manager's proprietary trading strategies or objectives, the Applicants believe that the proposed new Shares should benefit the markets.

## 3. Introducing Additional Competition into the U.S. ETF Market

Applicants believe that granting the requested Relief will introduce greater competition into the U.S. ETF market by allowing new ETF sponsors to offer their products. Applicants note that many Index ETFs currently trading are managed by a small number of advisors, some of whom hold exclusive licenses to various established financial indices. If the Relief requested herein is granted, existing ETF sponsors as well as new "start-up" providers may prefer to offer Active ETFs, rather than Index ETFs, given the scarcity of remaining established financial indices. Also, Applicants believe that there are not a large number of managers who will be willing to establish and operate Disclosed Actively Managed ETFs for the reasons described above.

In addition, other new providers who currently run actively managed mutual funds may be waiting for the first active ETF order to be granted. There is anecdotal evidence that some funds intend to request exemptive relief for their own active ETFs once the first applicants have borne the time and expense necessary to launch the first active ETF. Applicants believe that product design of the Trust and the Funds has addressed the issues raised in the Concept Release and will create new and attractive investment choices for institutional as well as retail investors.



#### 4. Trading History of Similar Products

The Applicants understand that, to date, Current ETFs, have consistently traded at, or very close to, their respective NAVs.<sup>76</sup> While past performance is no guarantee of future results, the Applicants believe that the close correspondence between the NAVs and market prices of SPDRs, DIAMONDS, QQQs, Select Sector SPDRs, iShares, Vanguard and Claymore ETFs, is due to the feature of continuous purchases and redemptions, which historically has facilitated price-correcting arbitrage activity. Applicants believe that the structure of these Current ETFs is substantially similar to that of the Trust and its Funds. Therefore, the Applicants expect Shares of the Funds should also trade close to NAV.

#### C. Discussion of Concerns Raised in the Concept Release

##### 1. Structure and Operation of the Trust and its Fund As Compared to Current ETFs

Given that the structure and operation of the Trust and its Funds is substantially similar to that of Current ETFs, Applicants believe that the arbitrage mechanism, using the AMEX Proprietary Method in lieu of the Transparency feature used by Current ETFs should operate in a manner similar to that for such ETFs, although Applicants note that the spreads in the bid and offer prices for Shares of each Fund may be somewhat wider than those experienced by Index ETFs.<sup>77</sup> Furthermore, the level and detail of information contained in the Prospectus for each Fund, as well as that displayed on the Website, will be extremely familiar to investors of Current ETFs. Consequently, Applicants have every expectation that the Funds should behave in a manner very similar to that of the Current ETFs presently trading in the secondary market.

##### a) Portfolio Transparency, "Front Running" and "Free Riding"

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<sup>76</sup> See, Rompotis, Gerasimos Georgiou, "A Empirical Look on Exchange Traded Funds" (May 2006), available at SSRN: <http://ssrn.com/abstract=905770> which found in the Conclusion that the average premium and discount of the ETFs studied did not exceed 10 basis points, "a fact that indicates the efficient arbitrage's execution by institutional investors".

<sup>77</sup> This will be mentioned in the Fund's Prospectus; See, Section V. A. 11, supra.

As discussed throughout this Application, Applicants believe that the Trust and the Funds can simultaneously (i) follow a normal policy of Confidentiality with respect to each Fund's Portfolio Securities while (ii) providing information about such Fund's characteristics through the use of the AMEX Proprietary Methodology. Due to each Fund's use of the Tracking Portfolio, no market participant will know, or be able to ascertain, the identity or specific quantities of its various Portfolio Securities, its Fund's trading strategies, recent securities purchases or sales. The identity of specified Index ETFs as Deposit Securities (and Redemption Securities, if different) will be made available to market participants in the same manner and to the same extent as is provided with respect to the deposit and redemption securities of Current ETFs. Applicants believe that each Fund's use of the Tracking Portfolio as an alternative to Transparency, coupled with the use of specified Index ETFs shares as Deposit or Redemption Securities, should eliminate the possibility of "front running" (observing a fund's trading trends to benefit from increasing or decreasing prices of the fund's portfolio stocks resulting from such fund's acquisition or sale of such stock) as well as "free riding" (benefiting from a manager's expert knowledge without investing in their funds and without paying fund management fees).

b) Liquidity of Portfolio Securities

Applicants state that that each Fund's Deposit Securities and Redemption Securities will be listed, liquid, actively traded and easy to follow during each trading day because usually they will be shares of specified, broad-based Index ETFs.<sup>78</sup> Therefore, creators and redeemers of Creation Units, as well as arbitrageurs, will have a ready ability to transact in such securities and hence the arbitrage opportunities offered by the Trust and its Funds can be expected to be similar as those offered by existing Current ETFs. Applicants intend that the contents of the Tracking Portfolio will be disclosed in the same manner and to the same extent as are the portfolio

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<sup>78</sup> As discussed herein, from time to time they may also be large-cap Portfolio Securities.

holdings of Current ETFs. Various arbitrageurs and market makers have advised the AMEX and Applicants that they believe the Tracking Portfolio will enable them to hedge their positions and to execute arbitrage transactions when the trading price of an Active ETF's shares meaningfully deviates from the IIV of its Tracking Portfolio.

c) Arbitrage Mechanism Provided by the AMEX Proprietary Methodology

As discussed herein, Applicants believe that the structure of the Trust and each Fund will offer arbitrage opportunities similar to those offered by existing Current ETFs. Applicants therefore believe that the secondary prices of each Fund's Shares will track the IIV of its Tracking Portfolio, which, in turn, is expected to be close to the NAV of such Fund's actual Securities Portfolio, as in the manner described below.

2. Transparency

Index ETFs have fully disclosed portfolios because they follow a specified financial index either by a replicable strategy or a "sampling" strategy. An Index ETF Fund manager is not concerned about the Confidentiality of its fund's portfolio holdings because typically the manager invests in shares of some or all of the stocks in a proportion similar to those stocks which comprise such fund's underlying index. The market prices of such Index ETF's shares, therefore, can be expected to vary closely in time and amount with the prices of the stocks in the underlying index. Information sufficient to accurately estimate the composition of the portfolios of the Index ETFs is made publicly available on a day-to-day and intra-day basis, and therefore reliable estimates of the intra-day values of these funds can be computed during intra-day trading based on the intra-day values of their portfolio assets at the start of the trading day. Given that composition of an Index ETF's portfolio is known, Liquidity Providers can hedge their exposure

to such a fund during periods when a short-term over-supply or over-demand for the shares of such Index ETFs exists.<sup>79</sup>

Confidentiality, however, is an important tool for the manager of an actively managed mutual fund, helping to bring value to investors by generating returns in excess of a comparable index mutual fund or such fund's performance benchmark. Confidentiality provides a portfolio manager of an actively traded fund with an opportunity to take advantage of price inefficiencies, market anomalies and forward-looking trends, among others, by buying or selling portfolio securities without signaling its strategies or plans to the marketplace. These benefits of Confidentiality, however, are hindrances to anyone wishing to design an exchange-traded version of an actively managed ETF. Confidentiality (i) prevents pricing evaluation by outside parties (because the intra-day value of the actively managed fund's portfolio is unknown), (ii) hinders hedging (because the composition and weight of the fund's Portfolio Securities is unknown) and (iii) hampers arbitrage (to preserve Confidentiality, the fund's portfolio manager may deliberately select creation/redemption baskets which are not representative of the fund's actual portfolio holdings). Therefore, in order to allow intra-day trading of an Active ETF, there is a need for systems and methods to provide a different creation/redemption structure that promotes arbitrage and a different mechanism to deliver information about the fund's behavior, information equivalent to the intra-day values and creation/redemption portfolios of Current ETFs without disclosure of the specific portfolio assets held by such funds.

(1) *Summary of the AMEX Proprietary Methodology*

In order to preserve Confidentiality and at the same time provide the necessary information for pricing, hedging, and arbitrage of Active ETFs, the Applicants have licensed and intend to use a process developed by the AMEX (the "AMEX Proprietary Methodology") which allows for

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<sup>79</sup> Disclosed Actively Managed ETFs, for a variety of reasons, also are willing to disclose the contents of their portfolios, and therefore can be expected to perform very similarly to Index ETFs with respect to these matters.

these functions to take place effectively without requiring disclosure of the Fund's actual portfolio holdings ("Actual Portfolio") on a daily basis. The AMEX Proprietary Methodology is a process which involves deriving a second portfolio, the "Tracking Portfolio", through the use of a risk modeling technique (described below) and the Actual Portfolio's associated risk characteristics. The purpose of the Tracking Portfolio is to provide a "proxy" for each Fund's Actual Portfolio in such a way that it will generate performance that closely approximates the intra-day movement of the Actual Portfolio itself, yet cannot be used to "reverse-engineer" the Fund's Actual Portfolio. The Tracking Portfolio, as such a "proxy", is designed to permit market participants to use it, instead of the Actual Portfolio, for intra-day pricing purposes and to create hedge positions. Applicants intend that the contents of this Tracking Portfolio will be published by each Fund on a nightly basis for use on the following trading day.

(2) *Description of AMEX Proprietary Methodology.*<sup>80</sup>

The risk modeling technique used by the AMEX in this process is Principal Component Analysis ("PCA"). PCA is a classical multi-variate statistical technique that originated with Pearson (1901) and has since been applied to many areas of the natural and economic sciences. Introductions may be found in the books by Muirhead (1982), Anderson (1984), Jolliffe (1986) and Flury (1988), these last two being devoted entirely to PCA and its extensions. A good survey of applications of PCA to financial markets may be found in Alexander (2001).<sup>81</sup>

Each day, after the market close, a risk model will be estimated by the AMEX Proprietary Methodology which utilizes PCA. In particular, the risk model will be based on each Active ETF's "Selection Universe", which is a group of securities designated by the Fund's

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<sup>80</sup> The discussion and information in this Application with respect to the AMEX Proprietary Methodology has been provided by AMEX to the Applicants for the purposes of inclusion in this Application. Patents have been issued and are pending with respect to the AMEX Proprietary Methodology.

<sup>81</sup> Market Models, Carol Alexander, John Wiley and Sons, 2001.

portfolio manager to closely represent the kind of securities such Active ETF might hold.<sup>82</sup> Utilizing very high frequency (intra-day) return history over a relatively short historical period, the AMEX Proprietary Methodology will estimate a set of risk factors for each Active Fund's Selection Universe. The purpose of the risk model is to capture the systematic common factor effects currently at work within the Selection Universe. Therefore, its design recognizes that, while there are some factors whose presence is more or less continuous (such as the market itself), there will be other, more transient factors (such as the bubble in internet stocks) that are only temporary. The AMEX Proprietary Methodology is, therefore, significantly different in concept from the commercial risk models used by institutional portfolio managers. The most important consideration in the design of this risk model is that it should be able to price each Active ETF effectively; in contrast, the ability to interpret the risk characteristics of such active ETF in intuitive economic terms is of no real importance. It therefore follows that basing the model strictly on current finance theory, such as the "Arbitrage Pricing Model",<sup>83</sup> is not of primary importance. Choosing factors on the basis of statistical analysis, in this context, is just as useful as their economic foundations.

Once a risk model for each Active ETF has been estimated for a particular day, then the specific risk characteristics of the Actual Portfolio (as of the close of that day) relative to that risk model can be determined through ordinary least squares regression analysis.<sup>84</sup> These risk characteristics are, in fact, the regression coefficients (betas) of the current Active Fund relative to each risk factor. Using these risk characteristics, the AMEX Proprietary Methodology can then determine a set of securities from the Selection Universe weighted in a way such that the set

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82 It is not a requirement that every holding in the Actual Portfolio be included in the Selection Universe.

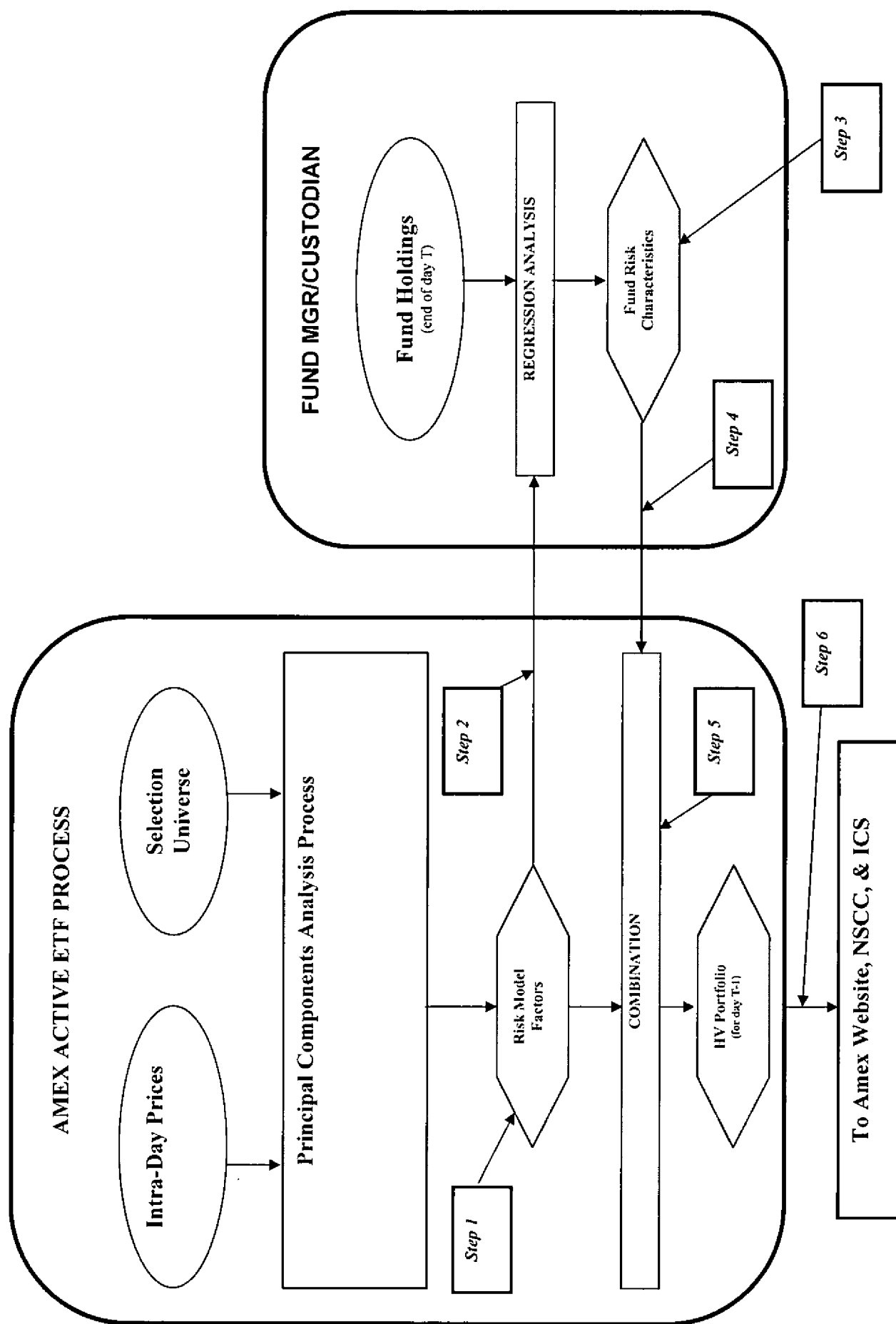
83 See "Arbitrage Pricing Trading", Chapter 12 at <http://web.mit.edu/15.407/file/Ch12.pdf#search=%22%22arbitrage%20pricing%20model%22%22>.

84 See Understanding Securities, A beginner's guide to Partial Least Squares Analysis, Haenlien and Kaplan, [http://www.leaonline.com/doi/abs/10.1207/s1532803lus0304\\_4?cookieSet=1&journalCode=us](http://www.leaonline.com/doi/abs/10.1207/s1532803lus0304_4?cookieSet=1&journalCode=us)

has the same risk characteristics as that of the Actual Portfolio. This set of securities, typically made up of the vast majority of the securities in the Selection Universe, is the Tracking Portfolio that will be distributed to the market and utilized the following trading day.

Creation of Tracking Portfolios will be a cooperative effort of the AMEX and each Fund's portfolio manager/Custodian. It will be accomplished without disclosure of each Fund's Actual Portfolio to the AMEX or anyone else outside the portfolio manager/Custodian organization(s). Figure 1 provides a schematic representation of the AMEX Proprietary Methodology below.

**Figure 1**





Using a history of returns for all the securities in the Active ETF's Selection Universe, the AMEX Methodology, on a nightly basis, will build a PCA-based risk model to determine the relevant risk factors for that Selection Universe over a specified historical period (Step 1 of Figure 1), and will electronically send that model to a system residing on a separate computer at portfolio manager/Custodian via a secure electronic network (Step 2 of Figure 1). That separate computer, in turn, will use the current Actual Portfolio supplied by the portfolio manager/Custodian, and a history of returns for such Active ETF's holdings, and will determine the risk characteristics of the Actual Portfolio relative to the current risk model through the use of ordinary least squares regression analysis (Step 3 of Figure 1). Once these characteristics are determined, portfolio manager/Custodian will electronically send those characteristics back to the AMEX via the same secure network used in Step 2 above (Step 4 of Figure 1). When it receives those coefficients, the AMEX Proprietary Methodology will utilize the risk characteristics of each security in the Selection Universe (determined at the same time as the risk model itself), and weight them to create a the Tracking Portfolio which has the same risk characteristics as does the Actual Portfolio (Step 5 of Figure 1). This Tracking Portfolio will then be posted on the AMEX website and through NSCC so as to be to be available to all market participants (Step 6 of Figure 1). At the same time, the Tracking Portfolio will be sent to the AMEX Index Calculation System ("ICS"). The ICS then will calculate and publish a value per share for the Tracking Portfolio every fifteen (15) seconds of the next trading day, in the same way IIV is calculated for the creation/redemption portfolio for Current ETFs.

Although the Shares are not yet listed on a Listing Exchange<sup>85</sup> and therefore do not trade in the secondary market, Applicants believe that the design, structure and operation of the Trust

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<sup>85</sup> Applicants are not aware of any characteristics of a NASDAQ listing that would cause Shares to operate or trade differently than if they were listed on another domestic Exchange. Applicants do acknowledge that unlike

and the Funds will result in an arbitrage mechanism that resembles, and operates in a manner similar to, the arbitrage mechanism which exists for Current ETFs. In light of this arbitrage mechanism inherent in each Fund's structure, Applicants submit that the secondary market prices for Shares of such Funds should trade at prices close to NAV and should closely reflect the value of each Fund's portfolio although Applicants note that the spreads in the bid and offer prices for Shares of each Fund may be somewhat wider than those experienced by Index ETFs.

(3) *Investor Uses and Benefits of Products*

Applicants believe that the Trust and its Funds will offer a variety of benefits that will appeal to individual and institutional investors alike. Applicants assert that these will be identical or substantially similar to the benefits offered by Current ETFs. These benefits include flexibility, tradeability, availability, certainty of purchase price and possible tax efficiencies. Equally of interest to investors will be the lower expense ratios of the Funds as compared to those of their directly competitive traditional mutual funds, due to their in-kind efficiencies in portfolio management as well as other reduced infrastructure costs. Applicants expect that reductions in the cost of trading, clearing, custody processes, shareholder reporting and accounting experienced by Current ETFs presently trading should also be experienced by the Trust and its Funds.

Applicants have made every effort to preserve Confidentiality and to structure the Funds in a way that would not favor creators, redeemers, arbitrageurs and other Liquidity Providers

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the structure of the other domestic Exchanges where a single member is contractually obligated to make a market in Shares and oversees trading in Shares, the NASDAQ trading system allows numerous market makers who wish to trade Shares to compete for business, creating liquidity by being willing to buy and sell Shares for their own accounts on a regular and continuous basis. Applicants note that NASDAQ's listing requirements require at least two market makers to be registered in Shares in order to maintain their NASDAQ listing and that registered market makers on NASDAQ must make a continuous, two-sided market at all times or risk regulatory sanctions. Applicants believe that the competition on NASDAQ among market makers, many of whom may be Authorized Participants, as defined below, engaging in arbitrage activities would result in an adequate market for Shares.

over retail investors buying and selling in the secondary market. Information about the Tracking Portfolio will be made available at least<sup>86</sup> in the same manner and to the same extent as such information is presently provided for Current ETFs.

(4) *Market Timing and Late Trading*

Applicants also observe that the ETF structure itself offers certain advantages in comparison to actively managed mutual funds. Index ETFs were not implicated in the “mutual fund crisis” that commenced in September 2003 when Eliot Spitzer, New York Attorney General, alleged that a hedge fund company had engaged in “late trading”<sup>87</sup> with several mutual fund families and charged that certain mutual fund groups had engaged in “late trading.”<sup>88</sup> Various commentators have observed that the ETF structure is inimical to the market timing and late trading abuses.<sup>89</sup> This is in part due to the fact that there are no “intermediaries” who handle orders to an exchange traded fund. Rather, each AP must deal directly with the Distributor and/or the Fund under strictly enforced 4 p.m. cut-off times.

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86 The Tracking Portfolio will be available on the website, in contrast to the Creation/Redemption Baskets which are available only through NSCC.

87 “Market timing is the opposite of the buy-and-hold strategy used by most long-term investors. For those few investors who constantly keep their eyes on the market, buying and selling their investments quickly allows them to take advantage of stale pricing, which happens with long-term mutual funds such as equity funds. Mutual fund prices become “stale” because funds are priced here at 4:00 p.m. Eastern Standard Time (EST). However, the prices of the individual securities held by these funds change throughout the day....” Market Timing and its Impact on Mutual Fund Investors... Investor Education Fund, Wednesday, March 17, 2004 at <http://www.fundlibrary.com/features/novice/page.asp?id=11787>.

88 “Late trading occurs when investors place trades after 4 PM but still receive the 4PM price ... late traders can use the information revealed after 4 PM to guide their trades: buying funds when their current value is greater than their 4 PM value and selling the funds when the reverse is true. Doing so allows them to earn expected abnormal returns at the expense of the fund’s long-term shareholders.” How Widespread is Late Trading in Mutual Funds? Eric Zitzewitz, Stanford Graduate School of Business, November 2004 at [faculty-gsb.stanford.edu/zitzewitz/Research/latetrading.pdf](http://faculty-gsb.stanford.edu/zitzewitz/Research/latetrading.pdf).

89 See for example, “ETFs Popularity Rises Amidst Mutual Fund Scandals”, at <http://www.hedgeco.net/exchange-traded-funds.htm> and “ETFs Less Scandalous than Mutual Funds,” Waggoner, Money, October 29, 2004 at <http://www.usatoday.com/money/perfi/columnist/waggon/2004-01-29-etf x.htm>.

(5) *The Commission Should Grant the Exemptive Relief Requested in This Application*

In summary, Applicants believe that the Trust and its Funds should operate in a manner very similar to that of existing Current ETFs, provide necessary safeguards against shareholder discrimination and potential conflicts of interest, and create no new regulatory concerns. Applicants submit that the benefits offered to potential investors are varied and useful, and that the Trust and its Funds are natural candidates for the requested Relief.

Based on the foregoing, the Applicants respectfully request the Relief as set forth below.

VII. REQUEST FOR RELIEF

A. Exemption from the Provisions of Sections 2(a)(32) and 5(a)(1)

Section 5(a)(1) of the Act defines an “open-end company” as “a management company which is offering for sale or has outstanding any redeemable security of which it is the issuer.”

The term “redeemable security” is defined in Section 2(a)(32) of the Act as:

any security, other than short-term paper, under the terms of which the owner, upon its presentation to the issuer or to a person designated by the issuer ... is entitled (whether absolutely or only out of surplus) to receive approximately his proportionate share of the issuer’s current net assets, or the cash equivalent thereof.

The Applicants believe that the Shares of each Fund could be viewed as satisfying the Section 2(a)(32) definition of a redeemable security. Shares are securities “under the terms of which” an owner may receive his proportionate share of the Funds’ current net assets; the differentiating aspect of such Shares is that the terms provide for such a right to redemption only when such individual Shares are aggregated with a specified number of such other individual Shares that together constitute a redeemable Creation Unit. Because the redeemable Creation Units of each Fund can be unbundled into individual Shares that are not individually redeemable, a possible question arises as to whether the definitional requirements of a “redeemable security”

or an “open-end company” under the Act would be met if such individual Shares are viewed as non-redeemable securities. In light of this possible analysis, the Applicants request an order to permit the Trust to register as an open-end management investment company and issue Shares that are redeemable in Creation Units only as described herein.

Although Shares will not be individually redeemable, Applicants expect that the market price of an individual Share will not vary much from its NAV due to the AMEX Proprietary Methodology and the resulting arbitrage possibilities created by the redeemability of Creation Units. Historical data relating to Index ETFs trading on AMEX, NYSE and NASDAQ shows this to be the case.<sup>90</sup>

Applicants believe that the Commission has the authority under Section 6(c) of the Act to grant the limited relief sought under Sections 2(a)(32) and 5(a)(1) of the Act. The Commission is authorized by Section 6(c) of the Act to exempt, conditionally or unconditionally, by order upon application, inter alia, any:

person, security, or transaction, or any class or classes of securities, or transactions, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of [the Act].

The Commission has stated its belief that Section 6(c) permits it “to exempt particular vehicles and particular interests from those provisions of the Act that inhibit competitive development of new products and new markets offered and sold in or from the United States.”<sup>91</sup> As the Commission itself has noted, Section 6(c) “is a general [Section] intended for use in unusual circumstances to deal with situations unforeseen at the time of the passage of the Act

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<sup>90</sup> See footnote 69, *supra*.

<sup>91</sup> Release No. 17354 at 84. See also, Protecting Investors: A Half Century of Investment Company Act Regulation, Report of the Division of Investment Management, United States Securities and Market Commission (May 1992) (“Half Century Report”) at 506-07.

and not provided for elsewhere in the Act.” In the Matter of Sisto Financial Corp., Investment Company Act Release No. 923 (July 17, 1946). In Release No. 17354 at 83, the Commission emphasizes its broad exemptive power under Section 6(c), pointing out that it:

has rejected the argument that simply because a provision prohibited certain conduct any exemption from that provision was contrary to the interest of the Act.

The Commission has consistently asserted its belief that its exemptive authority under Section 6(c) is all encompassing and applicable to any provision of the Act, as long as the purposes of the Act are advanced. Thus, the Commission found:

Section 6(c) permits us to exempt “any transaction” from “any provision” of the Act “if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of the investors and the purposes fairly intended by the policy and provisions of the title.” Section 6(c) was inserted in the Act to take care of the exceptional situations and transactions which, while they might not be permitted under the specific statutory terms of other provisions, might still be regarded as “consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.”

In the Matter of Hugh B. Baker, Investment Company Act Release No. 956 (Oct. 23, 1946)(quoting Atlantic Coast Line Co., 11 SEC. 661, 667 (1942); International Mining Co., 12 SEC.174 (1942)).

The Commission has also maintained that Section 6(c):

contains no qualifications or limitations as to the Section of the Act from which an exemption may be granted, or as to the types of prohibited transactions which may be exempted.... Nor is there anything in the legislative history of the Section which indicated a Congressional intent that its application be so limited.

In the Matter of Transit Investment Corp. & Albert M. Greenfield & Co., Investment Company Act Release No. 1171 (May 6, 1948). Similarly, the Commission has stated that:

the broad exemptive power provided in 6(c) was designed to enable [the Commission] to deal equitably with situations that could not be foreseen at the time the legislation was enacted.

In the Matter of the Trust Fund Sponsored by The Scholarship Club, Inc., Investment Company  
Act Release No. 5524 (Oct. 25, 1968).

The Commission's use of its exemptive power under Section 6(c) is, of course, to be exercised with a view to the:

responsibility to exercise with circumspection the broad power (regarding exemptions) conferred .... The broad power embodied must not be so freely applied that the basic objectives of the Act are thwarted ... the propriety of granting the relief which is sought depends largely upon the purposes of the Section from which an exemption is requested, the evils against which it is directed, and the ends which it seeks to accomplish.

In the Matter of Transit Investment Corp. And Albert M. Greenfield & Co., Investment Company Act. Release No. 1171 (May 6, 1948).

Applicants contend that both the product structure described, and the Relief requested, in this Application are extremely similar to the those products described, and the relief granted by the Commission, in the Claymore Order, ProShares Order, WT Order, Fidelity Order, Rydex ETF Order, the PowerShares Order, the FRESCO Order, the ETF Advisors Order, the iShares Orders, the Select Sector SPDR Order, the CountryBaskets Order and the WEBS Order, as well as in the Disclosed Actively Managed ETF Orders, in each case permitting the creation of Creation Units described in such orders to be separated into individual Shares which were not redeemable. Similarly, in the SuperTrust Order, the Commission granted relief under Section 4(2) of the Act, permitting the SuperUnits, as described therein, issued by a UIT, to be separated into non-redeemable components, the "SuperShares." Again, in the SPDR Order, the Commission granted relief under Section 4(2) of the Act to permit redeemable "Creation Unit"

aggregations of SPDRs issued by a UIT to be traded individually on a market without the benefit of redemption accorded such “Creation Unit” aggregations. See also, the MidCap Order, the DIAMONDS Order, the Nasdaq-100 Trust Order and the BLDRS Order. The Applicants believe that the issues raised in this Application, with respect to Sections 2(a)(32) and 5(a)(1) of the Act, are the identical issues raised in the applications for the above-mentioned orders and hence merit the same relief.

Creation Units of each Fund, like creation units of all Current ETFs, will always be redeemable in accordance with the provisions of the Act. Owners of Shares may purchase the requisite number of Shares and tender the resulting Creation Unit for redemption. Moreover, listing on the Listing Exchange will afford all holders of Shares the benefit of intra-day liquidity. Because Creation Units may always be purchased and redeemed at NAV (less certain transactional expenses), the price of Creation Units on the secondary market and the price of the individual Shares of a Creation Unit, taken together, should not vary substantially from the NAV of Creation Units.<sup>92</sup> In addition, each investor is entitled to purchase or redeem Creation Units rather than trade the individual Shares in the secondary market, although in certain cases the brokerage costs incurred to obtain the necessary number of individual Shares for accumulation into a Creation Unit may outweigh the benefits of redemption.

As Applicants have noted above, the Commission has considerable latitude to issue exemptive orders under Section 6(c) of the Act, which permits the Commission to deal with situations not foreseen when the Act came into effect in 1940. Indeed, the mere existence of Current ETFs is a direct result of the Commission’s exercise of its authority to issue exemptive orders during the last fifteen years, because these “hybrid” investment companies do not fit squarely within the structures prevalent in 1940 and codified in the Act. The Applicants believe

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<sup>92</sup> See footnote 69, *supra*.



that Shares may be issued and sold on a basis consistent with the policies of the Act and without risk of the abuses against which the Act was designed to protect. The Applicants further believe that exempting the Trust to permit it to register as an open-end management investment company and issue redeemable Creation Units of individual Shares, as described herein, is appropriate in the public interest and consistent with the protection of investors and the purposes of Section 1 of the Act, and, accordingly, the Applicants hereby request that the Application for an order of exemption be granted.

B. Exemption from the Provisions of Section 22(d) and Rule 22c-1

Section 22(d) of the Act provides that:

no registered investment company shall sell any redeemable security issued by it to any person except to or through a principal underwriter for distribution or at a current public offering price described in the prospectus.

Rule 22c-1 provides in part, that:

no registered investment company issuing any redeemable security, no person designated in such issuer's prospectus as authorized to consummate transactions in any such security, and no principal underwriter of, or dealer in, any such security shall sell, redeem, or repurchase any such security except at a price based on the current net asset value of such security which is next computed after receipt of a tender of such security for redemption or of an order to purchase or sell such security...

Shares of each Fund will be listed on the Listing Exchange and one or more Specialists or Market Makers will maintain a market for such Shares. The Shares will trade on and away from<sup>93</sup> the Listing Exchange at all times on the basis of current bid/offer prices and not on the basis of the NAV next calculated after receipt of any sale order. The purchase and sale of the Shares of each Fund will not, therefore, be accomplished at an offering price described in the

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<sup>93</sup> Consistent with Rule 19c-3 under the Exchange Act, AMEX, NYSE and NASD members are not required to effect transactions in Shares through the facilities of AMEX, NYSE or NASDAQ.

Prospectus, as required by Section 22(d), nor will sales and repurchases be made at a price based on the current NAV next computed after receipt of an order, as required by Rule 22c-1.

Based on the facts set forth herein, the Applicants respectfully request that the Commission enter an order under Section 6(c) of the Act exempting the Applicants from the provisions of Section 22(d) and Rule 22c-1 to the extent necessary to permit the trading of Shares of each Fund on and away from the Listing Exchange at prices based on a bid/offer market, rather than at the NAV per share of the relevant Fund as next computed. Applicants submit that the concerns sought to be addressed by Section 22(d) and Rule 22c-1 with respect to pricing are equally satisfied by the proposed method of pricing of the Shares of each Fund. The provisions of Section 22(d), as well as those of Rule 22c-1, appear to have been intended (1) to prevent dilution caused by certain riskless-trading schemes by principal underwriters and contract dealers, (2) to prevent unjust discrimination or preferential treatment among buyers, and (3) to ensure an orderly distribution system of shares by contract dealers by eliminating price competition from non-contract dealers who could offer investors shares at less than the published sales price and who could pay investors a little more than the published redemption price.<sup>94</sup>

The first two purposes -- preventing dilution caused by riskless-trading schemes and preventing unjust discrimination among buyers -- would not seem to be relevant issues for secondary trading by dealers in Shares of a Fund. Secondary market transactions in Shares would not cause dilution for owners of such Shares because such transactions do not directly involve Fund assets. A dilutive effect could occur only where transactions directly involving Fund assets take place.<sup>95</sup> Similarly, secondary market trading in Shares should not create

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<sup>94</sup> See, the Half Century Report at 299-303, Investment Company Act Release No. 131183 (April 22, 1993).

<sup>95</sup> The purchase and redemption mechanisms which include (i) the Transaction Fees imposed only on creating and redeeming entities and (ii) in-kind deposits made by creating entities and in-kind distributions made to

discrimination or preferential treatment among buyers. To the extent different prices exist during a given trading day, or from day to day, such variances occur as a result of third-party market forces, such as supply and demand, but do not occur as a result of unjust or discriminatory manipulation. Outside market forces do not cause discrimination among buyers by the Funds or any dealers involved in the sale of Shares.

With respect to the third possible purpose of Section 22(d), anyone may sell Shares of a Fund and anyone may acquire such Shares either by purchasing them on the Listing Exchange or by creating a Creation Unit of such Shares by making the requisite Creation Deposit (subject to certain conditions). No dealer should have an advantage over any other dealer in the sale of such Shares. In addition, as discussed above, Applicants believe that secondary market transactions in Shares of a Fund generally should occur at prices close to its IIV. Applicants expect that the arbitrage mechanism operating for existing Current ETFs as modified by the AMEX Proprietary Methodology, the use of the Tracking Portfolio and the IIV, as well as the use of Index ETFs as Deposit/Redemption Securities, should bring the trading price in Shares of a Fund close to its NAV. So, for example, if the prices for Shares should fall below the IIV of a Fund, an investor need only to accumulate enough individual Shares of such Fund to constitute a Creation Unit in order to redeem such Shares at NAV. Competitive forces in the marketplace should thus ensure that the margin between NAV, IIV and the price for Shares in the secondary market remains narrow. As discussed above, Applicants understand that, to date, the shares of most Index ETFs have consistently traded on an Exchange, at, or very close to, their respective NAVs. For all the reasons set forth herein, Applicants have strong reason to believe that the trading experience of Shares should closely resemble that of Index ETFs.

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redeeming entities, are designed specifically to prevent changes in the Funds' capitalizations from adversely affecting the interests of ongoing shareholders.

As discussed above, Applicants believe that the nature of the markets in the component securities underlying the Tracking Portfolio will be primarily determinant of premiums or discounts to IIV which, as a result of the application of the AMEX Proprietary Method, should be very close to the value of the Actual Portfolio of each Fund. Prices in the secondary market for Shares can be expected to fluctuate based on the market's assessment of price changes in the securities comprising the Tracking Portfolio. Of course, an investor executing a trade in Shares would not know at the time of such sale or purchase whether the price paid in the secondary market would be higher or lower than the actual NAV next computed by the Trust. Such an investor might not wish to wait for the computation of such NAV before selling or purchasing. Applicants believe that this ability to execute a transaction in Shares at an intra-day trading price has been, and will continue to be, a highly attractive feature to many investors and offers a key advantage to investors over the once-daily pricing mechanisms of traditional mutual funds. As has been previously discussed, this feature would be fully disclosed to investors, and the investors would trade in Shares in reliance on the efficiency of the market. Since the Actual Portfolio of the Fund will be managed in the same way, and subject to the same level of Confidentiality, as that of other portfolios managed by the portfolio manager, a Fund's Portfolio will be no more or no less susceptible to manipulation to produce benefits for one group of purchasers or sellers to the detriment of others than is the case now in connection with actively managed mutual funds.

On the basis of the foregoing, the Applicants submit (i) that the protections intended to be afforded by Section 22(d) and Rule 22c-1 are adequately addressed by the proposed methods for creating, redeeming and pricing Creation Units, pricing and trading Shares, as well as the AMEX Proprietary Methodology, the Tracking Portfolio and the IIV and (ii) that the relief requested is appropriate in the public interest and consistent with the protection of investors and the purposes

of Section 1 of the Act. Accordingly, the Applicants hereby respectfully request that an order of exemption be granted in respect of Section 22(d) and Rule 22(c)-1.

C. Exemption from the Provisions of Sections 17(a)(1) and 17(a)(2)

Applicants respectfully seek relief for in-kind Creation Unit transactions with the Funds by (i) persons who are affiliated persons of a Fund solely by virtue of holding with power to vote 5% or more, or more than 25%, of the Fund's, or of two or more Fund's, Shares ("First-Tier Affiliates") and (ii) affiliated persons of such First-Tier Affiliates who are not otherwise affiliated with the Funds and persons who are affiliated persons of a Fund solely by virtue of holding with power to vote five percent (5%), or more, or more than twenty-five percent (25%), of the outstanding voting securities of other registered investment companies (or series thereof), which are not Funds, advised by the Adviser ("Second-Tier Affiliates").

Section 17(a) of the Act, in general, makes it:

unlawful for any affiliated person or promoter of or principal underwriter for a registered investment company ... or any affiliated person of such a person, promoter or principal underwriter, acting as principal (1) knowingly to sell any security or other property to such registered investment company ... unless such sale involves solely (A) securities of which the buyer is the issuer, (B) securities of which the seller is the issuer and which are part of a general offering to the holders of a class of its securities or (C) securities deposited with a trustee of a unit investment trust ... by the depositor thereof, (2) knowingly to purchase from such registered company or from any company controlled by such registered company any security or other property (except securities of which the seller is the issuer)....

unless the Commission upon application pursuant to Section 17(b) of the Act grants an exemption from the provisions of Section 17(a). Section 17(b) provides that the Commission will grant such an exemption if evidence establishes that the terms of the proposed transaction are reasonable and fair, including the consideration to be paid or received, and do not involve overreaching on the part of any person concerned; that the proposed transaction is consistent

with the policy of each registered investment company concerned; and that the proposed transaction is consistent with the general purposes of the Act.

Because Section 17(b) could be interpreted to exempt only a single transaction from Section 17(a) and, as discussed below, there may be a number of transactions by persons who may be deemed to be either First-Tier or Second-Tier Affiliates, the Applicants are also requesting an exemption from Section 17(a) under Section 6(c). See, e.g., Keystone Custodian Funds, Inc., 21 S.E.C. 295 (1945), where the Commission, under Section 6(c) of the Act, exempted a series of transactions that otherwise would be prohibited by Section 17(a).

Section 2(a)(3) of the Act defines an affiliated person as:

(A) any person directly or indirectly owning, controlling, or holding with power to vote, 5 percentum or more of the outstanding voting securities of such other person; (B) any person 5 percentum or more of whose outstanding voting securities are directly or indirectly owned, controlled or held with power to vote, by such other person; (C) any person directly or indirectly controlling, controlled by, or under common control with, such other person; (D) any officer, director, partner, copartner or employee of such other person; (E) ... any investment advisor [or an investment company] or member of an advisory board thereof, and (F) ... [the depositor of any] unincorporated investment company not having a board of directors....

Section 2(a)(9) of the Act provides that "any person who owns beneficially, either directly or through one or more controlled companies, more than 25 per centum of the voting securities of a company shall be presumed to control such company."

There exists a possibility that a large institutional investor could own 5% or more of a Fund or the Trust, or in excess of 25% of the outstanding Shares of a Fund or the Trust, making that investor a First-Tier Affiliate of the Fund under Section 2(a)(3)(A) or Section 2(a)(3)(C) of the Act. There also exists the possibility in the future that a large institutional investor could own 5% or more, or more than 25%, of the outstanding voting securities of one or more other

registered investment companies (or series thereof) advised by the Adviser, making the investor a Second-Tier Affiliate of the Funds. For so long as such an investor was deemed to be an affiliate, Section 17(a)(1) could be read to prohibit that investor from depositing the Creation Deposit with a Fund in return for a Creation Unit (an in-kind purchase). Similarly, Section 17(a)(2) could be read to prohibit an affiliated investor from entering into an in-kind redemption procedure with a Fund. Also, the Specialist or Market Maker for a Fund's Shares of a Fund might accumulate, from time to time, 5% or more, or more than 25%, of its outstanding voting securities in connection with its market-making activities. The Applicants request an exemption to allow these holders of 5% or more or in excess of 25% of the outstanding Shares of each Fund and Second-Tier Affiliates to effectuate purchases and redemptions in-kind.

Applicants assert that no useful purpose would be served by prohibiting such affiliated persons from making in-kind purchases or in-kind redemptions of Shares of a Fund in Creation Units. Both the deposit procedures for in-kind purchases of Creation Units and the redemption procedures for in-kind redemptions will be effected in exactly the same manner for all purchases and redemptions. All will be issued and redeemed in the same manner at NAV. There will be no discrimination between purchasers or redeemers. Deposit Securities and Redemption Securities will be valued in the same manner as those Portfolio Securities currently held by a Fund.

Applicants also note that the ability to take deposits and make redemptions in-kind will help each Fund achieve certain of such Fund's objectives. Applicants do not believe that in-kind purchases and redemptions will result in abusive self-dealing or overreaching, but rather assert that such procedures will be implemented consistently with each Fund's objectives and with the general purposes of the Act. Applicants believe that in-kind purchases and redemptions will be made on terms reasonable to the Trust and such Fund and any affiliated persons because they will be valued pursuant to verifiable objective standards. The method of valuing Index ETFs held

by each Fund is the same as that used for calculating in-kind purchase or redemption values and therefore creates no opportunity for affiliated persons or the Applicants to effect a transaction detrimental to the other shareholders of such Fund. Similarly, Applicants submit that, by using the same standards for valuing Index ETFs held by each Fund as are used for calculating in-kind redemptions or purchases, NAV for Fund Shares will not be adversely affected by such securities transactions.

Accordingly, Applicants respectfully request that the Commission grant relief to the extent necessary to permit First-Tier Affiliates and Second-Tier Affiliates to purchase and redeem Creation Units in-kind. For the reasons set forth above, the Applicants believe that (i) with respect to the relief requested pursuant to Section 17(b), the proposed transactions are reasonable and fair and do not involve overreaching on the part of any person concerned, the proposed transactions are consistent with the policy of each Fund, and that the proposed transactions are consistent with the general purposes of the Act, and (ii) with respect to the relief requested pursuant to Section 6(c), the requested exemption for the proposed transactions is appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.<sup>96</sup> The proposed transactions will also be consistent with the policies of each Fund.

#### VIII. PRECEDENT AND COMPARABILITY OF RELIEF SOUGHT TO PRIOR RELIEF GRANTED BY THE COMMISSION

The Application of Applicants with respect to Sections 2(a)(32) and 5(a)(1) is virtually

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<sup>96</sup> The Applicants cite the exemptions granted In the Matter of GMO Core Trust Investment Company Act Release No. 15415 (Nov. 14, 1986) (order) and Investment Company Act Release No. 16048 (October 14, 1987) (order), in the SPDR Order, the MidCap Order, the DIAMONDS Order, the WEBS Order, the CountryBaskets Order, the Select Sector SPDR Order and the Nasdaq-100 Trust Order as examples of similar relief previously granted by the Commission.



identical to the applications for exemptions of (i) Claymore; (ii) Fidelity Trust; (iii) Rydex ETF Trust; (iv) PowerShares Exchange-Traded Fund Trust; (v) FRESCO Index Shares Funds; (vi) ETF Advisors Trust; (vii) Vanguard Index Funds; (viii) iShares MSCI Series; (ix) CountryBaskets; (x) Select Sector SPDR Trust, as well as those submitted in connection with the Disclosed Actively Managed ETF Orders, and is substantially similar to the applications for exemption with respect to Section 4(2) of the (xi) BLDRS Index Funds Trust; (xii) Nasdaq-100 Trust; (xiii) SPDR Trust; (xiv) MidCap SPDR Trust, (xv) DIAMONDS Trust; and (xvi) SuperTrust, each granted by the Commission.

The Application of the Applicants with respect to Section 22(d) and Rule 22(c)-1 thereunder (relating to trading of Shares on the Listing Exchange at prices determined by market forces) is virtually identical to the applications for exemptions of the: (i) Claymore; (ii) Fidelity Trust; (iii) BLDRS Index Funds Trust; (iv) Nasdaq-100 Trust; (v) Rydex ETF Trust; (vi) PowerShares Exchange-Traded Fund Trust; (vii) FRESCO Index Shares Funds; (viii) ETF Advisors Trust; (ix) Vanguard Index Funds; (x) SuperTrust; (xi) SPDR Trust; (xii) MidCap SPDR Trust; (xiii) DIAMONDS Trust; (xiv) iShares MSCI Series; (xv) Select Sector SPDR Trust; and (xvi) CountryBaskets, as well as those submitted in connection with the Disclosed Actively Managed ETF Orders, each granted by the Commission.

The Application of Applicants with respect to first-tier affiliations under Sections 17(a) and 17(b) of the Act is substantially similar to the application for the exemptions of: (i) GMO Core Trust; and is virtually identical to the applications for the exemptions of (i) Claymore; (ii) Fidelity Trust; (iii) BLDRS Index Funds Trust; (iv) Nasdaq-100 Trust; (v) Rydex ETF Trust; (vi) PowerShares Exchange-Traded Fund Trust; (vii) FRESCO Index Shares Funds; (viii) ETF Advisors Trust; (ix) Select Sector SPDR Trust; (x) DIAMONDS Trust; (xi) MidCap SPDR Trust; (xii) iShares MSCI Series; (xiii) CountryBaskets; and (xiv) the SPDR Trust, as well as

those submitted in connection with the Disclosed Actively Managed ETF Orders, each granted by the Commission. Applicants believe that the relief granted to the Fidelity Trust cited above also extended to second-tier affiliations, although such phrasing was not used in the order, and therefore we believe that the order granted to the Fidelity Trust is ample precedent for the relief requested herein. Applicants believe that such requested relief is consistent with the general purposes of the Act.

#### IX. EXPRESS CONDITIONS TO THIS APPLICATION

Applicants agree that any order of the Commission granting the requested Relief will be subject to the following conditions:

1. Applicants will not register any Future Fund, by means of filing a post-effective amendment to the Trust's registration statement or by any other means, unless (i) Applicants have requested and received with respect to such Future Fund, either exemptive relief from the Commission or a no-action letter from the Division of Investment Management of the Commission, or (ii) the Future Fund will be listed on an Exchange without the need for a filing pursuant to Rule 19b-4 under the Exchange Act.
2. As long as the Trust operates in reliance on the requested order, the Shares will be listed on a Listing Exchange.
3. Neither the Trust (with respect to any Fund) nor any Fund will be advertised or marketed as an open-end investment company or a mutual fund. Each Fund's Prospectus will prominently disclose that Shares are not individually redeemable shares and will disclose that the owners of Shares may acquire those Shares from

a Fund and tender those Shares for redemption to a Fund in Creation Units only. Any advertising material that describes the purchase or sale of Creation Units or refers to redeemability will prominently disclose that Shares are not individually redeemable and that owners of Shares may acquire those Shares from a Fund and tender those Shares for redemption to a Fund in Creation Units only.

4. The website for each Fund, which will be publicly accessible at no charge, will contain the following information, on a per Share basis, for each Fund: (a) the prior Business Day's NAV and the reported closing price, and a calculation of the premium or discount of such price against such NAV; and (b) data in chart format displaying the frequency distribution of discounts and premiums of the daily closing price against the NAV, within appropriate ranges, for each of the four previous calendar quarters.
5. The Prospectus and annual report for each Fund will also include: (a) the information listed in condition 4(b), (i) in the case of the Prospectus, for the most recently completed year (and the most recently completed quarter or quarters, as applicable) and (ii) in the case of the annual report, for the immediately preceding five years, as applicable; and (b) the following data, calculated on a per Share basis for one, five and ten year periods (or life of the Fund), (i) the cumulative total return and the average annual total return based on NAV and closing price, and (ii) the cumulative total return of the relevant Index.
6. Each Fund's Prospectus will clearly disclose that, for purposes of the Act, Shares are issued by the Funds and that the acquisition of Shares by investment companies is subject to the restrictions of Section 12(d)(1) of the Act, except as

permitted by an exemptive order that permits registered investment companies to invest in a Fund beyond the limits of Section 12(d)(1), subject to certain terms and conditions, including that the registered investment company enter into an agreement with such Fund regarding the terms of the investment.

#### X. NAMES AND ADDRESSES


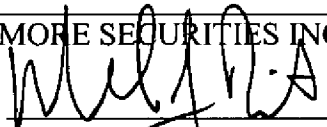
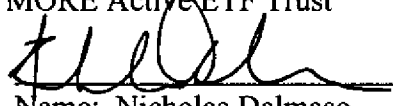
All questions concerning this Application should be directed to the persons listed on the facing page of this Application. The following are the names and addresses of Applicants:

<b><u>Claymore Advisors, LLC</u></b>  2455 Corporate West Drive Lisle, Illinois 60532  <b><u>Claymore Active ETF Trust</u></b>  2455 Corporate West Drive Lisle, Illinois 60532	<b><u>Claymore Securities, Inc.</u></b>  2455 Corporate West Drive Lisle, Illinois 60532
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XI. PROCEDURAL MATTERS, CONCLUSIONS AND SIGNATURES

Based on the facts, analysis, and conditions in the Application, Applicants respectfully request that the Commission issue an order under Sections 6(c), 2(a)(32), 5(a)(1) and 22(d) of the Act and Rule 22c-1 under the Act and under Sections 6(c) and 17(b) of the Act for an exemption from Sections 17(a)(1) and 17 (a)(2) of the Act. In accordance with rule 0-5 under the Act, Applicants request that the Commission issue the requested order without holding a hearing.

Dated: April 21, 2008

<p>CLAYMORE ADVISORS, LLC</p> <p>By: </p> <p>Name: Michael J. Rigert Title: Vice Chairman</p>	<p>CLAYMORE SECURITIES INC.</p> <p>By: </p> <p>Name: Michael J. Rigert Title: Vice Chairman</p>
<p>CLAYMORE Active ETF Trust</p> <p>By: </p> <p>Name: Nicholas Dalmaso Title: Sole Trustee</p>	

## XII. PROCEDURAL MATTERS, CONCLUSIONS AND SIGNATURES

Applicants file this Application dated as of April 10, 2008 in accordance with rule 0-2 under the Act, and state that their address is printed on the Application's facing page, and that they request that all written communications concerning the Application be directed to the person and address printed on the Application's facing page. Also, Applicants have attached as exhibits to the Application the required verifications, and proposed notice of Application. Michael J. Rigert is authorized to sign and file this document on behalf of **CLAYMORE SECURITIES, INC** pursuant to the general authority vested in him as Vice Chairman; Michael J. Rigert is authorized to sign and file this document on behalf of the **Adviser** pursuant to the general authority vested in him as Vice Chairman; Nicholas Dalmaso is authorized to sign and file this document on behalf of the **Trust** pursuant to the following resolutions adopted by the Board of the Trust on October 2, 2006.

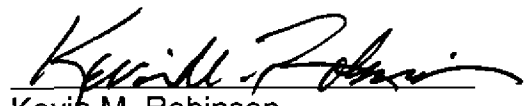
SECRETARY'S CERTIFICATE

The undersigned, in his capacity as General Counsel and Secretary of Claymore Advisors, LLC (the "Company") hereby certify that Michael J. Rigert is Vice Chairman of the Company and that the written consent attached hereto as Exhibit A was adopted by the Board of Managers of the Company on February 14, 2008 and such consent has not been amended, modified or rescinded and remains in full force and effect as of the date hereof and that Michael J. Rigert is hereby authorized to sign and file the ETF Application for an order of exemption, for and on behalf of the Company.

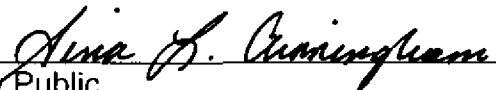
IN WITNESS WHEREOF, the undersigned has executed this certificate this 18<sup>th</sup> day of April, 2008.

CLAYMORE ADVISORS, LLC

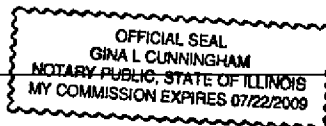
By:

  
Kevin M. Robinson  
General Counsel and Secretary

Subscribed and sworn before me this 18<sup>th</sup> day of April, 2008.

  
Notary Public

My Commission expires:



**ACTION BY UNANIMOUS WRITTEN CONSENT OF  
THE MANAGERS OF  
CLAYMORE ADVISORS, LLC**

The undersigned, being all of the managers of Claymore Advisors, LLC, a Delaware limited liability company (the "Company"), hereby consent to and adopt the following resolutions by written consent in lieu of a meeting and waive any notice required to be given in connection with such action:

**RESOLVED**, that the appointment of Anthony J. DiLeonardi as the Vice Chairman of the Company, effective as of Feb 14 2008, to hold such office and serve in such capacity until his successor is chosen or his earlier resignation or removal, is hereby approved, ratified and confirmed; and

**FURTHER RESOLVED**, that the following individuals continue to hold the office(s) of the Company set forth opposite their name and to serve in such capacity until their successors are chosen and qualified or their earlier resignation or removal:

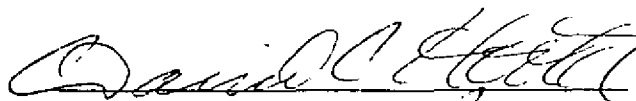
<u>Individual</u>	<u>Office</u>
David C. Hooten	Chairman of the Board and Chief Executive Officer
Christian Magoon	President
Michael Rigert	Vice Chairman
Kevin Robinson	Senior Managing Director, General Counsel and Secretary
Nicholas Dalmaso	Senior Managing Director and Chief Administrative Officer
Steven Hill	Senior Managing Director
Bruce Albelda	Chief Financial Officer
Anne Kochevar	Senior Managing Director and Chief Compliance Officer
J. Thomas Futrell	Chief Investment Officer

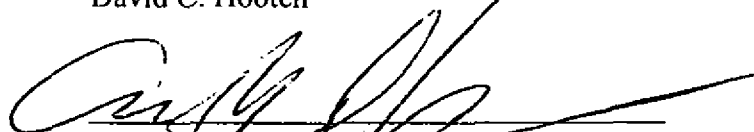
This Written Consent may be signed in one or more counterparts, each of which shall be deemed an original, and all of which shall constitute one and the same document.




The undersigned have executed this consent as of this 10<sup>th</sup> day of February, 2008..

**MANAGERS:**

  
David C. Hooten

  
Anthony J. DiLeonardi

  
Michael J. Riger

  
Bruce Albelda

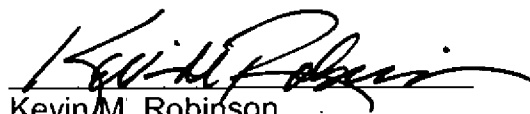
## SECRETARY'S CERTIFICATE

The undersigned, in his capacity as General Counsel and Secretary of Claymore Securities, Inc. (the "Company") hereby certify that Michael J. Rigert is Vice Chairman of the Company and that the written consent attached hereto as Exhibit A was adopted by the Board of Directors of the Company on February 14, 2008 and such consent has not been amended, modified or rescinded and remains in full force and effect as of the date hereof and that Michael J. Rigert is hereby authorized to sign and file the ETF Application for an order of exemption, for and on behalf of the Company.

IN WITNESS WHEREOF, the undersigned has executed this certificate this 18<sup>th</sup> day of April, 2008.

CLAYMORE SECURITIES, INC.

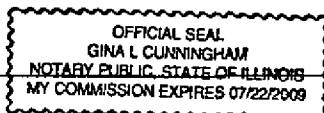
By:

  
Kevin M. Robinson  
General Counsel and Secretary

Subscribed and sworn before me this 18<sup>th</sup> day of April, 2008.

  
Notary Public

My Commission expires:



**ACTION BY UNANIMOUS WRITTEN CONSENT OF  
THE BOARD OF DIRECTORS OF  
CLAYMORE SECURITIES, INC.**

The undersigned, being all of the members of the Board of Directors of Claymore Securities, Inc., a Kansas corporation (the "Company"), hereby consent to and adopt the following resolutions by written consent in lieu of a meeting and waive any notice required to be given in connection with such action:

**RESOLVED**, that the appointment of Anthony J. DiLeonardi as the Vice Chairman of the Company, effective as of Feb. 14 2008, to hold such office and serve in such capacity until his successor is chosen or his earlier resignation or removal, is hereby approved, ratified and confirmed; and

**FURTHER RESOLVED**, that the following individuals continue to hold the office(s) of the Company set forth opposite their name and to serve in such capacity until their successors are chosen and qualified or their earlier resignation or removal:

<u>Individual</u>	<u>Office</u>
David C. Hooten	Chairman of the Board and Chief Executive Officer
Christian Magoon	President
Michael Rigert	Vice Chairman
Kevin Robinson	Senior Managing Director, General Counsel and Secretary
Nicholas Dalmaso	Senior Managing Director and Chief Administrative Officer
Steven Hill	Senior Managing Director
Bruce Albelda	Chief Financial Officer
Anne Kochevar	Senior Managing Director and Chief Compliance Officer
J. Thomas Futrell	Chief Investment Officer

This Written Consent may be signed in one or more counterparts, each of which shall be deemed an original, and all of which shall constitute one and the same document.

The undersigned have executed this consent as of this 14th day of February, 2008.

**BOARD MEMBERS:**



David C. Hooten



Anthony J. DiLeonardi



Michael J. Riger



Bruce Albelda

STATE OF ILLINOIS)  
:SS..  
COUNTY OF COOK)


The undersigned, being duly sworn, deposes and says that he has duly executed the attached application for and on behalf of CLAYMORE ADVISORS LLC , that he is the Vice Chairman of such entity, and is authorized to sign the application on behalf of such entity, and that all action by shareholders, directors, trustees and other bodies necessary to authorize deponent to execute and file such instrument has been taken. Deponent further says that he is familiar with such instrument and its contents, and that the facts therein set forth are true to the best of his knowledge, information and belief.

CLAYMORE ADVISORS LLC

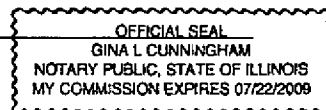
By:

  
Name: Michael J. Rigert  
Title: Vice Chairman

Subscribed and sworn to before me this 18th day of April, 2008.

  
Notary Public

My Commission expires:



STATE OF ILLINOIS)  
:SS..  
COUNTY OF COOK)

The undersigned, being duly sworn, deposes and says that he has duly executed the attached application for and on behalf of CLAYMORE SECURITIES INC., that he is the Vice Chairman of such entity, and is authorized to sign the application on behalf of such entity, and that all action by shareholders, directors, trustees and other bodies necessary to authorize deponent to execute and file such taken. Deponent further says that he is familiar with such in and that the facts therein set forth are true to the best of his belief.

CLAYMORE SECURITIES INC.

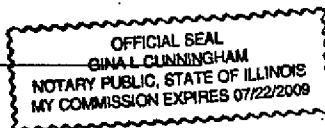
By:

  
Name: Michael L. Rigert  
Title: Vice Chairman

Subscribed and sworn to before me this 18th day of April, 2008.

  
Notary Public

My Commission expires:




STATE OF ILLINOIS)  
:SS..  
COUNTY OF COOK)


The undersigned, being duly sworn, deposes and says that he has duly executed the attached application for and on behalf of CLAYMORE ACTIVE ETF TRUST, that he is the Sole Trustee of such entity, and is authorized to sign the application on behalf of such entity, and that all action by shareholders, directors, trustees and other bodies necessary to authorize deponent to execute and file such instrument has been taken. Deponent further says that he is familiar with such instrument and its contents, and that the facts therein set forth are true to the best of his knowledge, information and belief.

CLAYMORE ACTIVE ETF TRUST

By:

  
Name: Nicholas Dalmaso  
Title: Sole Trustee

Subscribed and sworn to before me this 18th day of April, 2008.

  
Notary Public  
My Commission expires:



## AUTHORIZATION AND SIGNATURES

In accordance with Rule 0-2(c) under the Act, Applicants state that all actions necessary to authorize the execution and filing of this Application dated as of April 10, 2008 have been taken, and the persons signing and filing this document are authorized to do so on behalf of Applicants. Michael J. Rigert is authorized to sign and file this document on behalf of Claymore Securities, Inc., pursuant to the general authority vested in him as Vice Chairman .

CLAYMORE SECURITIES, INC.

By: 

Name: Michael J. Rigert

Title: Vice Chairman

Dated: April 18, 2008



In accordance with Rule 0-2(c) under the Act, Applicants state that all actions necessary to authorize the execution and filing of this Application dated as of April 10, 2008 have been taken, and the persons signing and filing this document are authorized to do so on behalf of Applicants. Michael J. Rigert is authorized to sign and file this document on behalf of Claymore Advisors LLC, pursuant to the general authority vested in him as Vice Chairman.

CLAYMORE ADVISORS LLC

By:

  
Name: Michael J. Rigert  
Title: Vice Chairman

Dated: April 18, 2008

In accordance with Rule 0-2(c) under the Act, Applicants state that all actions necessary to authorize the execution and filing of this Application dated as of April 10, 2008 have been taken, and the persons signing and filing this document are authorized to do so on behalf of Applicants. Nicholas Dalmaso is authorized to sign and file this document on behalf of Claymore Active ETF Trust, pursuant to the general authority vested in him as Sole Trustee.

Claymore Active ETF Trust

By:



Name: Nicholas Dalmaso

Title: Sole Trustee

Dated: April 18, 2008

**Verification of Application and Statement of Fact**

STATE OF ILLINOIS)

:SS..

COUNTY OF COOK)

In accordance with Rule 0-2(d) under the Act, the undersigned, being duly sworn, deposes and says that he has duly executed the attached Application for an order, dated as of April 10, 2008 for and on behalf of Claymore Securities, Inc.; that he is the Vice Chairman of such company; and that all actions taken by the other persons necessary to authorize deponent to execute and file such instrument have been taken. Deponent further says that he is familiar with such instrument, and the contents thereof, and that the facts therein set forth are true to the best of his knowledge, information and belief.

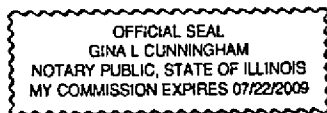
By: \_\_\_\_\_

Name: Michael J. Rigert

Subscribed and sworn to before me, a notary public, this 18 th day of April, 2008.

\_\_\_\_\_  
Notary Public

My commission expires:



STATE OF ILLINOIS)  
:SS..  
COUNTY OF COOK)

By:

Subscribed and sworn to before me, a notary public, this 18th day of April, 2008.

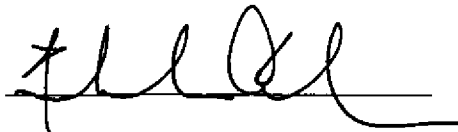
Notary Public

OFFICIAL SEAL  
GINA L CUNNINGHAM  
NOTARY PUBLIC, STATE OF ILLINOIS  
MY COMMISSION EXPIRES 07/22/2009


**Verification of Application and Statement of Fact**

STATE OF ILLINOIS)  
:SS..  
COUNTY OF COOK)

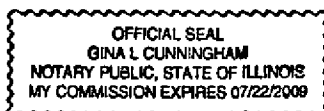
In accordance with Rule 0-2(d) under the Act, the undersigned, being duly sworn, deposes and says that he has duly executed the attached Application for an order, dated as of April 10, 2008 for and on behalf of Claymore Active ETF Trust; that he is the Sole Trustee of such company; and that all actions taken by the other persons necessary to authorize deponent to execute and file such instrument have been taken. Deponent further says that he is familiar with such instrument, and the contents thereof, and that the facts therein set forth are true to the best of his knowledge, information and belief.

By:   
Name: Nicholas Dalmaso

Subscribed and sworn to before me, a notary public, this 18 th day of April, 2008.

  
Notary Public

My Commission expires:



## EXHIBIT A

### Glossary of Defined Terms

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Index ETFs.....	7	WT.....	6

## EXHIBIT B

### Description of the Initial Funds

#### 1. Large Value Equity Fund

The Large Value Equity Fund seeks to achieve a high rate of total return. The Fund's equity investments are mainly common stocks, but may also include other types of equities such as preferred or convertible stocks. The Fund may invest up to 20% of total assets in foreign securities.

Dreman Value Management, L.L.C. will be the Sub-Advisor for the Fund, and will use a contrarian value investment strategy. The portfolio managers employ a low price-to-earnings approach and identify financially solid companies that provide the opportunity for above-market returns without above-market volatility. The portfolio managers concentrate the portfolio when they see outstanding opportunity.

#### 2. Large Growth Fund

The Large Growth Fund will pursue its investment objective by normally investing primarily in a core group of common stocks selected for their growth potential.

The portfolio manager will apply a "bottom up" approach in choosing investments. The portfolio manager will look at companies individually to determine if a company is an attractive investment opportunity and if it is consistent with the Fund's investment policies. If the portfolio manager is unable to find such investments, the Fund's uninvested assets may be held in cash or similar investments, subject to the Fund's specific investment policies.

Within the parameters of its specific investment policies, the Fund may invest in foreign equity and debt securities, which may include investments in emerging markets.

## EXHIBIT C

### Draft Notice of Application:

ACTION: Notice of application for an Order under Section 6(c) of the Investment Company Act of 1940 ("Act") for an exemption from Sections 2(a)(32), 5(a)(1), and 22(d), of the Act and Rule 22c-1 under the Act and under Sections 6(c) and 17(b) of the Act for an exemption from Sections 17(a)(1) and (a)(2) of the Act.

Summary of Application: Applicants request an order that would permit an open-end management investment company, whose separate investment portfolios of securities (each, a "Fund") will consist of certain domestic equity component securities, as well as in futures contracts, options on futures contracts, options, and swaps, cash and cash equivalents, and certain other registered investment companies, all in accordance with the requirements of the Act and rules promulgated thereunder, to (i) issue shares with limited redeemability ("Shares"); (ii) permit secondary market transactions in the shares of the investment company at negotiated prices; and (iii) permit affiliated persons of the investment company to deposit securities into, and receive securities from, the investment company in connection with the purchase and redemption of aggregations of the investment company shares.

Applicants: Claymore Securities, Inc., Claymore Advisors, LLC, and the Claymore Active ETF Trust.

Filing Dates: The application was filed on April 22, 2008 and amended on \_\_\_\_\_, and on \_\_\_\_\_.

Hearing or Notification of Hearing: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving Applicants with a copy of the request, personally or by mail. Hearing



requests should be received by the SEC by 5:30 p.m. on [DATE] and should be accompanied by proof of service on Applicants, in the form of an affidavit, or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the SEC's Secretary.

Addresses: Secretary, SEC, 100 F. Street, N.E., Washington, D.C. 20549. Claymore Securities, Inc. c/o Claymore Advisors, LLC, \_\_\_\_\_ Attn: \_\_\_\_\_ and Claymore Trust, \_\_\_\_\_ Attn: \_\_\_\_\_

For Further Information Contact: Michael W. Mundt, Senior Special Counsel, at (202) 551-6820, or \_\_\_\_\_ (Division of Investment Management, Office of Investment Company Regulation).

Supplementary Information: The following is a summary of the application. The complete application may be obtained for a fee from the SEC's Public Reference Branch, 100 F Street, N.E., Washington, D.C. 20549.

Applicants' Representations:

1. The Trust is an open-end management investment company registered with the SEC<sup>1</sup> and organized as a Delaware business trust. The Trust is authorized to issue an unlimited number of Funds which are the subject of the Application. Each Fund will be advised by Claymore Advisors, LLC ("Adviser"), which is an entity controlled by Claymore Group Inc. ("\_\_\_\_\_"). The Adviser will act as investment advisor for each Fund. The Adviser has entered into a "Sub-Advisory Agreement" with \_\_\_\_\_ ("Sub-Adviser") with respect to the Funds. \_\_\_\_\_ is a separately identifiable division of \_\_\_\_\_. The Adviser and the Trust may, in the future, hire different Sub-Advisers that are investment advisers within the meaning of Section 2(a)(20)(B) of the Act and are not affiliated persons of the Adviser or the Funds. The Adviser will oversee the Sub-Advisory administrator, custodian, transfer agent, index receipt agent, fund accountant, dividend disbursing agent and securities lending agent services for each Fund. \_\_\_\_\_

<sup>1</sup> SEC File No. 811-\_\_\_\_\_.

("Distributor") a broker-dealer registered under the Securities Exchange Act of 1934 ("Exchange Act"), will serve as the principal underwriter of each Fund on an agency basis.

2. Each Fund will invest in a portfolio of certain domestic equity securities generally consisting of the component securities of a specified securities index and financial instruments relating thereto and money market instruments ("Fund Securities").

3. In the future, \_\_\_\_\_ intends to offer additional equity Fund series that are not yet described or identified in the Application ("Future Funds" and together with the Funds named in paragraph 2 above, the "Funds"). Each Future Fund will be advised by the Adviser or an entity controlled by, or under common control with, the Adviser and will be in the same group of Investment Companies as the Initial Funds. The Trust will not offer Future Funds unless: (1) Applicants have requested and received with respect to each such Future Fund either (i) exemptive relief from the U.S. Securities and Exchange Commission ("Commission") or (ii) a no-action letter from the Division of Investment Management of the Commission ("Staff") expressly relating to such Future Funds; or (2) the Future Funds will be listed on an Exchange (defined in representation 10, below) without the need for a filing pursuant to Rule 19b-4 under the Exchange Act. Any Future Fund relying on any order granted pursuant to this Application will comply with the terms and conditions stated in the Application.

4. The Trust will issue, with respect to each Fund on a continuous offering basis, shares of the Trust ("Shares") which generally will be issued in aggregations of 10,000 to 50,000 Shares ("Creation Units"). The price of a Creation Unit will be a minimum of \$200,000 (based on an initial Share price range of \$10 to \$50). To be eligible to purchase a Creation Unit, an investor must enter into a Participant Agreement to become an Authorized Participant and must be either (1) a broker-dealer or other participant in the Continuous Net Settlement ("CNS") System of The National Securities Clearing Corporation ("NSCC"), a clearing agency registered with the Commission, or (2) a Participant in DTC. Except for certain Funds that may be created by an all-cash deposit, an investor wishing to purchase a Creation Unit from the Trust will have to transfer to the Trust a "Creation Deposit" consisting of: (i) a portfolio of equity securities<sup>2</sup> selected by the Adviser and/or (ii) a cash payment.<sup>3</sup> An investor purchasing

<sup>2</sup> Applicants observe that the International Funds may hold American Depositary Receipts ("ADRs"), Global Depositary Receipts ("GDRs") or Euro Depositary Receipts ("EDRs") (collectively "Depository Receipts") as Portfolio Securities. Applicants state that the identity of the depository bank for any Depository Security is not, and will not be, a criteria used by the AMEX Methodology or the Sub-Adviser to identify securities for inclusion in an International Fund's portfolio. To the extent an International Fund invests in ADRs, they will be listed on a national securities exchange. To the extent a Fund invests in other Depository Receipts, they will be listed on a non-U.S. exchange. The International Funds will not invest in any unlisted Depository Receipts or any listed Depository Receipts that are illiquid or for which pricing information is not readily available. All Depository Receipts must be sponsored (with the exception of certain pre-1984 ADRs that are listed and unsponsored because they are grandfathered). The International Funds may invest in Depository Receipts for which BNY's Depository Receipts Division ("BNY DR Division") acts as the depository bank. The value of the Index underlying an International Fund will reflect only the value of the Index's constituents and not the value of any Depository Receipt representing an Index constituent. The Advisor and its affiliated persons, as such term is defined in Section 2(a)(3) of the 1940 Act, do not and will not serve as the depository bank for any Depository Receipts. Applicants note that BNY has a Depository Receipts Division ("BNY DR Division") which is a prominent participant in the market for certain Depository Receipts and that International Funds may invest in Depository Receipts for which the BNY DR Division acts as the depository bank. In order to minimize

a Creation Unit from the Trust may be charged a purchase fee ("Transaction Fee") to prevent the dilution of the interests of the remaining shareholders resulting from the Trust incurring costs in connection with the purchase of the Creation Units.<sup>4</sup> Each Fund will disclose in its statutory prospectus ("Prospectus") and/or statement of additional information ("SAI") the Transaction Fees charged by such Fund or the method of calculating such Transaction Fees.

5. Orders to purchase Creation Units of Shares will be placed with the Distributor who will be responsible for transmitting the orders to the Trust. The Distributor will issue confirmations of acceptance, issue delivery instructions to the Trust to implement the delivery of Creation Units, and maintain records of the orders and the confirmations. The Distributor also will be responsible for delivery of prospectuses to purchasers of Creation Units. For International Funds, orders to purchase Creation Units are placed with the Distributor, the Distributor will then inform the Adviser and the Fund's custodian. The custodian will then inform the appropriate subcustodians. The Authorized Participant will deliver to the appropriate sub-custodians the relevant securities (or the cash value of all or a part of such securities, in the case of a permitted or required cash purchase or "cash in lieu" amount), with any appropriate adjustments as determined by the Fund. Securities must be delivered to the accounts maintained at the applicable subcustodians. The subcustodians will confirm to the custodian that the required securities have been delivered, and the custodian will notify the Adviser and Distributor. The Distributor will then furnish the purchaser with a confirmation and Prospectus.

6. Persons purchasing Creation Units of Shares from the Trust may hold the Shares or sell some or all of them in the secondary market. Shares will be listed on a national securities exchange (an "Exchange") and trade in the secondary market in the same manner as other equity securities. A specialist will be assigned, or market makers will agree, to make a market in each series of Shares by each Exchange. The prices of Shares on an Exchange will be based on a current bid/offer market and are expected to be in the range of \$10 to \$60 per Share initially, depending upon the individual Fund. Transactions involving the purchase and sale of Shares in the secondary market will be subject to customary brokerage commissions and charges. Applicants expect that the price at which the Shares trade will be disciplined by

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the potential for conflicts, the Sub-Adviser will be required to obtain the authorization, or ratification, of the Advisor to include in an International Fund's Deposit Securities or Portfolio Securities any Depository Receipt for which the BNY DR Division acts as depository bank. The Advisor will grant such authorization (or ratification) only if it believes that doing so would be in the best interests of an International Fund based on a number of factors recited in the Application. The Sub-Adviser will also be required to provide a monthly report to the Advisor showing for each International Fund (a) the Fund's holdings (if any) of Depository Receipts for which the BNY DR Division acts as the depository bank, and (b) such information as the Advisor deems appropriate in connection with the "best interest" finding described above. A summary of the information in the monthly reports will be presented to the Board of the International Funds at least annually

<sup>3</sup> The identity and number of shares of the equity securities in a Creation Deposit required for each Fund will change as the Manager may determine

<sup>4</sup> The Transaction Fee for each Fund will be separately determined. The Transaction Fee will be limited to amounts determined by the Advisor to be appropriate and will take into account the transaction costs associated with the Creation Units for each Fund.

arbitrage opportunities created by the ability to continually purchase or redeem Creation Units at their NAV, which should ensure that the Shares will not trade at a material discount or premium in relation to their most recently calculated intra-day indicative value.

7. Applicants expect that purchasers of Shares in Creation Units will include institutional investors and arbitrageurs (which could include institutional investors). The exchange specialist or market maker also may purchase Shares in connection with its market-making activities on the relevant Exchange. Applicants expect that secondary market purchasers of Shares will include both institutional and retail investors.<sup>5</sup>

8. Shares will not be individually redeemable. Shares will only be redeemable in Creation Units.<sup>6</sup> To redeem, an investor will have to accumulate enough Shares to constitute a Creation Unit. An investor redeeming Shares in a Creation Unit will receive a portfolio of securities and/or a payment of cash, as published daily by the Fund's Adviser or Sub-Adviser, and in effect on the date the redemption request is made. A redeeming investor may pay a Transaction Fee calculated in the same manner as a Transaction Fee payable in connection with the purchase of a Creation Unit.

9. Applicants state that neither the Trust nor any Fund will be marketed or otherwise held out as a "mutual fund." Rather, Applicants state that the Trust will be marketed as an "exchange-traded fund." All marketing materials will refer to the Trust as an "investment company" and "fund" without reference to an "open-end" or "mutual fund," except to contrast the Shares of the Trust with the shares of a conventional open-end management investment company. In all marketing materials where the method of obtaining, buying or selling Shares is described, Applicants will include a statement to the effect that Shares are not redeemable except in Creation Units. The same type of disclosure will be provided in the Prospectus as well as the Trust's SAI, advertising materials, and all reports to shareholders.<sup>7</sup>

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<sup>5</sup> Shares will be registered in book-entry form only. DTC or its nominee will be the registered owner of all outstanding Shares. Records reflecting the beneficial owners of Shares will be maintained by DTC or its participants.

<sup>6</sup> Creation Units which are redeemed for securities of a Fund may be redeemed through the Distributor, which will act as the Trust's agent for redemption.

<sup>7</sup> Applicants state the persons purchasing Creation Units will be cautioned in the Trust's Prospectus that some activities on their part may, depending on the circumstances, result in their being deemed statutory underwriters and subject them to the prospectus delivery and liability provisions of the Security Act of 1933 ("Securities Act"). For example, a broker-dealer firm or its client may be deemed a statutory underwriter if it takes Creation Units after placing an order with the Distributor, breaks them down into the constituent Shares, and sells Shares directly to its customers; or if it chooses to couple the creation of a supply of new Shares with an active selling effort involving solicitation of secondary market demand for Shares. The Trust's Prospectus will state that whether a person is an underwriter depends upon all the facts and circumstances pertaining to that person's activities. The Trust's Prospectus also will state that broker-dealer firms should also note that dealers who are not "underwriters" but participating in a distribution (as contrasted to ordinary secondary trading transactions), and thus dealing with Shares that are part of an "unsold allotment" within the meaning of Section 4(3)(C) of the Securities Act, would be unable to take advantage of the prospectus delivery exemption provided by Section 4(3) of the Securities Act.

10. Applicants state that that they intend to rely upon the relief granted under Section 12(d)(1)(J) of the Act in the Claymore Index ETF Order<sup>8</sup> for an exemption from Sections 12(d)(1)(A) and (B) of the Act to permit registered management investment companies and unit investment trusts to acquire shares of the Funds beyond the limits of Section 12(d)(1)(A) of the Act and each Fund and/or a broker-dealer (a "Broker") registered under the Securities Exchange Act of 1934 (the "Exchange Act") to sell shares to registered management investment companies and unit investment trusts beyond the limits of Section 12(d)(1)(B) of the Act ("12(d)(1) Relief"). Applicants represent that the Trust and its series described herein belong to the same "group of investment companies" (as defined in Section 12 (d)(1)(G)(ii)) as the Claymore Exchange-Traded Fund Trust series and therefore intend to rely upon the 12(d)(1) Relief granted in the Claymore Index ETF Order to the same extent and for the same purposes.

Applicants' Legal Analysis:

1. Applicants request an order under Section 6(c) of the Act granting an exemption from Sections 2(a)(32), 5(a)(1) and 22(d), and of the Act and Rule 22c-1 under the Act; under Sections 6(c) and 17(b) of the Act granting an exemption from Sections 17(a)(1) and 17(a)(2) of the Act.

2. Section 6(c) of the Act provides that the Commission may exempt any person, security, or transaction, or any class of persons, securities or transactions, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

3. Sections 5(a)(1) and 2(a)(32) of the Act defines an "open-end company" as a management investment company that is offering for sale or has outstanding any redeemable security of which it is the issuer. Section 2(a)(32) of the Act defines a redeemable security as any security, other than short-term paper, under the terms of which the holder, upon its presentation to the issuer is entitled to receive approximately his proportionate share of the issuer's current net assets, or the cash equivalent. Because Shares will not be individually redeemable, Applicants request an order that would permit the Trust and each of its Funds to register and operate as an open-end management investment company. Applicants state that investors may purchase Shares in Creation Units from each Fund and redeem Shares in Creation Units. Applicants further state that because the market price of Creation Units will be disciplined by arbitrage opportunities, investors should be able to sell Shares in the secondary market at prices that do not vary substantially from their most recently calculated intra-day indicative value.

4. Section 6(c) of the Act provides that the Commission may exempt any person, security, or transaction, or any class of persons, securities, or transactions, if and to the extent that such

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<sup>8</sup> See, In the Matter of Claymore Exchange-Traded Fund Trust, et al.; ("Claymore") (File No. 812-13297) Investment Company Act Release No. 27483 (September 18, 2006).

exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purpose fairly intended by the policy and provisions of the Act.

5. Section 22(d) of the Act, among other things, prohibits a dealer from selling a redeemable security that is being currently offered to the public by or through an underwriter, except at a current public offering price described in the Prospectus. Rule 22c-1 under the Act generally requires that a dealer selling, redeeming, or repurchasing a redeemable security do so only at a price based on its NAV. Applicants state that secondary market trading in Shares will take place at negotiated prices, not at a current offering price described in the prospectus, and not at a price based on NAV. Thus, purchases and sales of Shares in the secondary market will not comply with Section 22(d) and Rule 22-c-1. Applicants request an exemption from these provisions.

6. Applicants assert that the concerns sought to be addressed by Section 22(d) of the Act and Rule 22c-1 under the Act with respect to pricing are equally satisfied by the proposed method of pricing Shares. Applicants maintain that while there is little legislative history regarding Section 22(d), its provisions, as well as those of Rule 22c-1, appear to have been designed to (i) prevent dilution caused by certain riskless-trading schemes by principal underwriters and contract dealers, (ii) prevent unjust discrimination or preferential treatment between and among buyers resulting from sales at different prices, and (iii) assure an orderly distribution of investment company shares by eliminating price competition from dealers offering shares at less than the published sales price and repurchasing shares at more than the published redemption price.

7. Applicants believe that none of these purposes will be thwarted by permitting Shares to trade in the secondary market at negotiated prices. Applicants state (i) that secondary market trading in Shares does not involve the Trust as a party and cannot result in dilution of an investment in Shares, and (ii) to the extent different prices exist during a given trading day, or from day to day, such variances occur as a result of third-party market forces, such as supply and demand, not as result of unjust or discriminatory manipulation. Therefore, Applicants assert that secondary market transactions in Shares should not lead to discrimination or preferential treatment among purchasers. Finally, Applicants contend that the proposed distribution system will be orderly because arbitrage activity will ensure that the difference between the market price of Shares and their NAV remains narrow.

8. Section 17(a) of the Act generally prohibits an affiliated person of a registered investment company, or an affiliated person of such person, from selling any security to or purchasing any security from such investment company. Because purchases and redemptions of Creation Units may, from time to time, involve whole or partial "in-kind" transactions rather than cash transactions, Section 17(a) may prohibit affiliated persons of the Trust from purchasing or redeeming Creation Units. Because the definition of "affiliated person" of another person in Section 2(a)(3) of the Act includes any person owning five percent or more of an issuer's outstanding voting securities, certain purchasers of Creation Units may be affiliated with the Trust. Applicants request an exemption from Section 17(a) under Sections 6(c) and 17(b), to permit affiliated persons of the Trusts to effect in-kind or partially in-kind purchases and redemptions of Creation Units.

9. Section 17(b) authorizes the Commission to exempt a proposed transaction from Section 17(a) if evidence establishes that the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching, and the proposed transaction is consistent with the policies of the registered investment company and the general provisions of the Act. Applicants contend that no useful purpose would be served by prohibiting affiliated persons of the Trust or a Fund described above from purchasing or redeeming Creation Units. The composition of a Creation Deposit made by a purchaser or the redemption securities given to a redeeming investor will be the same regardless of the investor's identity, and will be valued under the same objective standards applied to valuing the portfolio securities held by each Fund. Therefore, Applicants state that "in-kind" purchases and redemptions will afford no opportunity for an affiliated person of the Trust to effect a transaction detrimental to the other holders of its Shares. Applicants also believe that "in-kind" purchases and redemptions will not result in abusive self-dealing or overreaching by affiliated persons of the Trust.

Applicants' Conditions:

Applicants agree that the order granting the requested relief will be subject to the following conditions:

1. Applicants will not register a Future Fund, by means of filing a post-effective amendment to the Trust's registration statement or by any other means, unless (i) Applicants have requested and received with respect to such Future Fund, either exemptive relief from the Commission or a no-action letter from the Division of Investment Management of the Commission, or (ii) the Future Fund will be listed on an Exchange without the need for a filing pursuant to Rule 19b-4 under the Exchange Act.
2. As long as the Trust operates in reliance on the requested order, the Shares will be listed on a Listing Exchange.
3. Neither the Trust (with respect to any Fund) nor any Fund will be advertised or marketed as an open-end investment company or a mutual fund. Each Fund's Prospectus will prominently disclose that Shares are not individually redeemable shares and will disclose that the owners of Shares may acquire those Shares from a Fund and tender those Shares for redemption to a Fund in Creation Units only. Any advertising material that describes the purchase or sale of Creation Units or refers to redeemability will prominently disclose that Shares are not individually redeemable and that owners of Shares may acquire those Shares from a Fund and tender those Shares for redemption to a Fund in Creation Units only.
4. The website for each Fund, which will be publicly accessible at no charge, will contain the following information, on a per Share basis, for each Fund: (a) the prior Business Day's NAV and the reported closing price, and a calculation of the premium or discount of such price against such NAV; and (b) data in chart format displaying the frequency distribution of discounts and premiums of the daily closing price against the NAV, within appropriate ranges, for each of the four previous calendar quarters. In

addition, the Product Description for each Fund will state that the website for the Fund has information about the premiums and discounts at which the Fund's Shares have traded.

5. The Prospectus and annual report for each Fund will also include: (a) the information listed in condition 4(b), (i) in the case of the Prospectus, for the most recently completed year (and the most recently completed quarter or quarters, as applicable) and (ii) in the case of the annual report, for the immediately preceding five years, as applicable; and (b) the following data, calculated on a per Share basis for one, five and ten year periods (or life of the Fund), (i) the cumulative total return and the average annual total return based on NAV and closing price, and (ii) the cumulative total return of the relevant Index.
6. Each Fund's Prospectus and Product Description will clearly disclose that, for purposes of the Act, Shares are issued by the Funds and that the acquisition of Shares by investment companies is subject to the restrictions of Section 12(d)(1) of the Act, except as permitted by an exemptive order that permits registered investment companies to invest in a Fund beyond the limits of Section 12(d)(1), subject to certain terms and conditions, including that the registered investment company enter into an agreement with the Fund regarding the terms of the investment.

For the Commission, by

**END**

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